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United States
Circuit Court of Appeals
For the Ninth Circuit.

T. J. SMITH,

Appellant,

vs.

L. M. WHITE, et al.,

Appellees.


Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

OCT 29 1947

PAUL P. O'BRIEN,
CLERK



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for the District of Arizona

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amendment to Schedules A-2 and B-2H.....	30
Appeal Bond and Receipt.....	78
Appeal:	
Notice of	78
Designation of Portion of Record on.....	79
Creditor's Designation of Portion of Record on	81
Order Extending Time to File Record on..	82
Clerk's Certificate to Transcript of Record on	82
Appellant's Statement of Points Under Rule 19(6) and Designation of Record for Printing	100
Attorneys of Record.....	1
Clerk's Certificate to Transcript of Record....	82
Creditor's Designation of Portion of Record, Proceedings and Evidence to Be Contained in the Record on Appeal to the Circuit Court of Appeals	81

INDEX	PAGE
Debtor's Petition in Proceedings Under Section 75	6
Summary of Debts and Assets.....	8
Schedule A—Statement of All Debts of Debtor	9
Schedule B—Statement of All Property of Debtor	15
Designation of Portion of Record, Proceedings and Evidence to Be Contained in the Record on Appeal to the Circuit Court of Appeals...	79
Docket Entries.....	2
Final Inventory	31
Memorandum of Objecting Creditor L. M. White	42
License for General Engineering Con- tractor	47
Hearing on First Meeting of Creditors of T. J. Smith, Debtor.....	48
Cross-Examination of T. J. Smith, Debtor by:	
Mr. Bilby	49
Hearing on Adjourned Meeting of Credi- tors of T. J. Smith, Debtor.....	67
Cross-Examination of T. J. Smith, Debtor by:	
Mr. McFall	68
Mr. Henderson	71
Mr. Hill	73

INDEX	PAGE
Notice of Adjourned Meeting of Creditors.....	29
Notice of Appeal.....	78
Notice of First Meeting of Creditors.....	24
Summary of Inventory, Statement of In- debtedness and List of Creditors.....	25
Order Approving Debtor's Petition and Refer- ring to Conciliation Commissioner.....	23
Order Dismissing Debtor's Petition.....	77
Order Extending Time to File Record on Ap- peal and Docket Action	82
Order to Show Cause.....	41
Proceedings Before C. R. McFall, Conciliation Commissioner	33
Minutes of First Meeting of Creditors.....	34
Minutes of Adjourned First Meeting of Creditors	37
Certificate of Commissioner.....	39
Report and Certificate to the Judge.....	39
Reporter's Transcript.....	83
Order to Show Cause.....	83
Examination of T. J. Smith by:	
Mr. Corbin (direct).....	85
The Court	88
Mr. Hill	95

ATTORNEYS OF RECORD

MESSRS. CORBIN & ORME,
220 Industrial Building,
Phoenix, Arizona,

Attorneys for Appellant,

MESSRS. KNAPP, BOYLE, BILBY &
THOMPSON,
ARTHUR HENDERSON, ESQ.
Valley National Building,
Tucson, Arizona.

Attorneys for Appellee,

L. M. White, Objecting Creditor. [3*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

BANKRUPTCY DOCKET

Cause No. B-525 Tucson

In the Matter of
T. J. SMITH, Debtor.

Section under which filed: Section 75

Type of case: Voluntary

Occupation: Farmer

Type of debtor: Ind.

Residence: Box 97, Maranna, Ariz.

Referee and Trustee—Conciliation Comr.: C. R.
McFall, Trustee.

Attorneys—John W. Corbin & M. C. Burk,
Phoenix, Arizona.

CLERK'S DOCKET ENTRIES

1947

Mar. 14—File debtor's petition and schedules in
duplicate.

Mar. 24—Enter and file Order approving debtor's
petition and referring matter to Concilia-
tion Comr.

Mar. 24—Forward copy of petition and schedules
and copy of Order approving debtor's
petition to conciliation comr.

Mar. 25—Forward notice to Gen'l Accounting Office
of debts due U. S.

Mar. 29—File Conciliation Comr's. Notice of First
Meeting of Creditors on 4/9/47 at
Tucson.

1947

- Apr. 18—File report and certificate to the Judge by the conciliation comr.
- Apr. 18—File conciliation Com's. record of proceedings.
- Apr. 22—Enter and file order to show cause why objection to jurisdiction of this court should not be sustained and dismissed upon the ground that said petitioner is not a farmer within the meaning of Section 75 of the Bankruptcy Act, for hearing on May 14, 1947.
- Apr. 22—Forward copy of order to Conciliation Commissioner.
- Apr. 23—Issue notice to all counsel of record, debtor, creditors and interested parties of Order to Show Cause, dated 4/22/47.
- May 14—Order to Show Cause, etc., on for hearing this date. Debtor, T. J. Smith present in person with his counsel, John Corbin; Ben C. Hill and Ashby Lohse present for creditor, Wid Coffin. No other appearance. Hearing now had on said Order to Show Cause. Debtor, T. J. Smith, sworn and examined for the information of the Court. Matter submitted and taken under advisement. Order counsel for debtor to file memorandum, allow ten (10) days within which to file said memo.
- May 15—Order that Knapp, Boyle, Bilby and Thompson, attorneys for L. M. White, be given five (5) days after filing of debtor's memorandum of authorities within which to file a memorandum of authorities op-

1947

posing contentions made by the debtor in the hearing of May 14th and further permitting the said attorneys to file a transcript of the examination of the debtor before the Conciliation Commissioner on April 9th and April 15th.

May 27—File Debtor's Brief.

June 2—File Memorandum of Authorities of Knapp, Boyle, Bilby and Thompson, attorneys for L. M. White, in opposition to contentions made by debtor, together with Transcript of Proceedings hearings April 9 and April 15, 1947. [4]

June 4—It appearing to the Court that petitioner T. J. Smith in his answer to show cause why petition should not be dismissed failed to show cause why the petition should not be dismissed on the grounds and for the reason he is not a farmer within the meaning of Section 75 of the Bankruptcy Act, Order that the petition be and is dismissed.

June 4—Enter order of June 4, 1947, in Bankruptcy Docket.

June 4—Issue notice to Conciliation Commissioner.

June 4—File Statistical Report on Form J. S. 23 in triplicate.

June 5—Issue notice to counsel, debtor and all interested parties of order of 6/4/47.

July 2—File Notice of Appeal, of Debtor. (\$5.00)

July 2—Issue copies of Notice of Appeal to counsel, creditors and interested parties.

1947

- July 28—File Appellant's Designation of Portion of Record, etc. on Appeal.
- July 28—File Appeal Bond and Receipt.
- July 28—File Reporter's Transcript of Testimony in duplicate.
- July 28—Receive \$250.00 cost bond on appeal and deposit in R. F.
- July 30—Forward copies of Designation of Portion of Record, etc., to counsel, creditors and interested parties.
- Aug. 5—Order grant 20 days extension of time in which to file record on appeal in CCA.
- Aug. 7—File Creditor's Designation of Portion of Record, Proceedings and Evidence to be Contained in the Record on Appeal to the Circuit Court of Appeals.
- Aug. 19—Prepare and forward transcript of record on appeal to CCA (10 pages at 40c, 70 pages at 10c, \$11.00).
- Aug. 19—Enter clerk's miscellaneous fee for mailing 4 sets of notices to 25 creditors on following dates: Apr. 23, June 5, July 2 and July 30, 1947—(80 notices at 10c, 20 notices at 5c, \$9.00). [5]

In the District Court of the United States for the
Southern District of Arizona, Tucson Division.

No. B-525-Tucson

In the Matter of
T. J. SMITH, Debtor.

DEBTOR'S PETITION IN PROCEEDINGS
UNDER SECTION 75 OF THE BANK-
RUPTCY ACT

Form 63

To the Honorable Howard Speakman, Judge of the
District Court of the United States for the
Southern District of Arizona.

The Petition of T. J. Smith, Residing at No.....
Street, in the.....County of Pima, State of
Arizona, respectfully represents:

That he is primarily bona fide personally engaged
in producing products of the soil (or the principal
part of whose income is derived from any one or
more of the foregoing operations) as follows:.....
that such operations occur in the county (or coun-
ties) of Pima, within said judicial district; that he
is insolvent (or unable to meet his debts as they
mature); and that he desires to effect a composi-
tion or extension of time to pay his debts under
section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A,"
and verified by your petitioner's oath, contains a
full and true statement of all his debts, and (so far
as it is possible to ascertain) the names and places

of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

That the schedule hereto annexed, marked "B," and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

JOHN W. CORBIN and
M. C. BURK,
Attorney for Petitioner.

/s/ T. J. SMITH,
Petitioner.

United States of America, District of Arizona,
State of Arizona, County of Maricopa—ss.

I, T. J. Smith, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ T. J. SMITH,
Petitioner.

Subscribed and sworn to before me this 12th day
of March, A.D., 1947.

[Seal] /s/ JOHN W. CORBIN,
Notary Public.

My commission expires: October 24, 1949. [6]

Summary of Debts and Assets

(From the Statements of the Debtor in Schedules A and B)

		Dollars	Cents
Schedule A.1—a	Wages.....	\$	215.00
Schedule A.1—b (1)	Taxes due United States.....		15,909.44
Schedule A.1—b (2)	Taxes due States.....		
Schedule A.1—b (3)	Taxes due counties, districts and municipalities.....		857.00
Schedule A.1—c (1)	Debts due any person, including the United States, having priority by laws of the United States.....		
Schedule A.1—c (2)	Rent having priority.....		
Schedule A.2	Secured claims.....		24,850.10
Schedule A.3	Unsecured claims.....		118,358.87
Schedule A.4	Notes and bills which ought to be paid by other parties thereto.....		
Schedule A.5	Accommodation paper.....		
Schedule A, total			<u>160,190.41</u>
Schedule B.1	Real estate.....		90,149.90
Schedule B.2—a	Cash on hand.....		500.00
Schedule B.2—b	Negotiable and non-negotiable instruments and securities.....		
Schedule B.2—c	Stocks in trade.....		
Schedule B.2—d	Household goods.....		7,000.00
Schedule B.2—e	Books, prints and pictures.....		1,000.00
Schedule B.2—f	Horses, cows and other animals.....		700.00
Schedule B.2—g	Automobiles and other vehicles.....		1,200.00
Schedule B.2—h	Farming stock and implements.....		12,000.00
Schedule B.2—i	Shipping and shares in vessels.....		
Schedule B.2—j	Machinery, fixtures, and tools.....		35,000.00
Schedule B.2—k	Patents, copyrights, and trade-marks.....		
Schedule B.2—l	Other personal property.....		
Schedule B.3—a	Debts due on open accounts.....		
Schedule B.3—b	Policies of insurance.....		
Schedule B.3—c	Unliquidated claims.....		188,196.28
Schedule B.3—d	Deposits of money in banks and elsewhere.....		
Schedule B.4	Property in reversion, remainder, expectancy or trust.....		500.00
Schedule B.5	Property claimed as exempt.....		4,000.00
Schedule B.6	Books, deeds and papers.....		
Schedule B, total			<u>240,246.18</u>

J. J. Smith

Petitioner

(1)

Schedule A. Statement of All Debts of Debtor

SCHEDULE A-1.

Statement of all creditors to whom priority is secured by the act.

A.—Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding \$600 each, earned within three months before filing the petition.

Amount due
or Claimed.
Dollars Cents

Reference to Ledger or Voucher. — Names of Creditors. — Residences (if unknown, that fact must be stated). — When and where incurred or contracted. — Whether claim is contingent, unliquidated or disputed. — Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom.

C. M. Brady
Phoenix, Arizona
February, March and April, 1946 (undisputed)

\$215.00

B.—Taxes due and owing to—(1) The United States

15,909.44*

(2) The State of Arizona - none

(3) The county, district or municipality of

Pima

State of Arizona

857.00

Reference to Ledger or Voucher. — Names of Creditors. — Residences (if unknown, that fact must be stated). — When and where incurred or contracted. — Whether claim is contingent, unliquidated or disputed. — Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom.

*This is total of the claim remaining of record; this amount was included in a judgment entered in the Superior Court of Maricopa County in favor of the United States and against T. J. Smith, Warren M. and Lewis M. Tenney, and Arthur Pinner, Jr., which judgment was paid in full and accepted by the U. S. officials but final settlement has not been accepted by the Commissioner of Internal Revenue. We are informed that it contains certain

penalties which they will not waive in the approx. amt. of \$574.21

C.—(1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority. which may be a final liability.

Reference to Ledger or Voucher. — Names of Creditors. — Residences (if unknown, that fact must be stated). — When and where incurred or contracted. — Whether claim is contingent, unliquidated or disputed. — Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom.

(Above stated United States for tax liens and the taxes due Pima County, Arizona.)

C.—(2) Rent owing to a landlord who is entitled to priority by the laws of the State of

, accrued within three months before filing the petition, for actual use and occupancy.

Reference to Ledger or Voucher. — Names of Creditors. — Residences (if unknown, that fact must be stated). — When and where incurred or contracted. — Whether claim is contingent, unliquidated or disputed. — Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom.

None

Total \$16,981.44

T. J. Smith
(2)

Petitioner

SCHEDULE A-2.

Creditors Holding Securities

N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Act of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—Description of Securities.—When and where debts were contracted, and nature and consideration thereof.—Whether claim is contingent, unliquidated or disputed.

Value of Securities

Dollars Cents

Amount due or Claimed.

Dollars Cents

L. M. White, Tucson, Arizona,
Real estate mortgage covering the
following described property:

The southwest quarter of the northwest
quarter;
The southwest quarter;
The west half of the southeast quarter;
The southeast quarter of the southeast
southeast quarter of Section 15;
The north half of Section 22, and
All of Section 16;
All in Township 11 South of Range 10
East, G. & S. R. B. & M., Pima County,
Arizona, 1,280 acres

\$115,000.00

Amount of Mortgage

Interest at 6% for three-quarters

\$23,780.00

1,070.10

Mortgage dated March 16, 1943, for money loaned.

Total

\$24,850.10

J. B. Smith
(3)

Petitioner



SCHEDULE A-3.

Creditors whose Claims are Unsecured

4. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property).

Debtor to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where secured.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt, and whether any agent, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount due or Claimed.	
	Dollars	Cents
Fred Tregaska and Edell, Tucson, Arizona, merchandise 1946 promissory note in the amount of with interest at 8%	600.00	28.00
Arizona Fertilizer Company, Phoenix, Arizona dusting cotton, 1946	1,103.64	
Marsh & Franklin, Phoenix, Arizona airplane for dusting, 1946	160.00	
Tucson Realty & Trust Company, Tucson, Arizona 3 year insurance policy, 1946-47-48	528.10	
Allison Steel Company, Phoenix, Arizona diesel engine and installation 1946	10,022.51	
Shell Chemical Company, Phoenix, Arizona fertilizer 1946	334.06	
Allan K. Perry, 1st Nat'l Bank Bldg., Phoenix, Arizona attorney's fees	3,796.47	
Judgment in favor of Warren M. & Lewis N. Tenney dated October 22, 1946, c/c Jennings, Strouss & Trask, subject to allowances as follows: Phoenix, Arizona	10,000.00	
Judgment in favor of the City of Phoenix in the amount of \$2500.00, dated April 25, 1945, with interest at 6% until paid against Warren M. & Lewis N. Tenney and T. J. Smith - equipment rental 1943	2,500.00	
Judgment in favor of Phelps-Dodge Mercantile Co. in the amount of \$463.39 with interest at 6% until paid, dated May 31, 1944 - merchandise 1942-43	463.39	

(Note: It is provided in the judgment in favor of the Tenneys and against T. J. Smith that credit on this \$10,000.00 judgment shall be given for any part of the judgment in favor of Phelps-Dodge Mercantile Co. or the City of Phoenix over and above 50% thereof paid by T. J. Smith is credited on the above \$10,000.00 judgment with interest.)

Total 29,536.17

T. J. Smith

Petitioner

(4)

SCHEDULE A-3 Continued

Creditors whose Claims are Unsecured

N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property).

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.	Amount due or Claimed.
Dollars	Cents
<p>Judgment in favor of Arthur Pinner, Jr., dated October 4, 1946, in the total sum of and costs in the sum of \$78,562.70 <i>c/o Moore, Romley & Nece, Phoenix, Arizona</i> (Such judgment provides for an off-set against the same in the amount of judgment entered in favor of T. J. Smith and against Arthur Pinner, Jr., on the same date in the amount of \$32,002.00 leaving a net amount of \$47,620.70 in favor of Pinner, pending in Supreme Court on appeal, unliquidated.)</p>	<p>\$78,562.70 1,060.00</p>
<p>Claim of Belyea Trucking Company in the approximate sum of \$700.00, trucking 1942-43, 6800 S. Alameda St., (This is unliquidated and disputed.) Los Angeles, Calif.</p>	<p>700.00</p>
<p>Claim of Jennings, Strauss & Trask in the amount of (This is unliquidated and disputed.) Attorneys' fees for Warren M. and Lewis M. Tenney and T. J. Smith</p>	<p>2,100.00</p>
<p>Claim of W. J. Coffin, St. Anthony, Idaho, in the sum of (This is unliquidated and disputed.) equipment for 1943</p>	<p>6,400.00</p>
<p>Total</p>	<p>\$88,822.70</p>
<p><i>J. R. Smith</i> (4)-a</p>	<p>Petitioner</p>

SCHEDULE A-4.

Liabilities on Notes or Bills Discounted which ought to be Paid by the Drawers, Makers, Acceptors, or Indorsers.

(N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, acceptors, or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars shall be stated as to notes or bills on which the debtor is liable as indorser.)

Reference to Ledger or Voucher.—Names of holders as far as known.—Residences (if unknown, that fact must be stated).—Place where contracted.—Whether claim is disputed.—Nature and consideration of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.

Amount due or Claimed.
Dollars Cent

None

Total

J. J. Smith
(5)

Petitioner

Accommodation Paper.

B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Give same particulars as to other commercial paper.)

Balance to Ledger or Voucher.—Names of Holders.—Residences (if unknown, that fact must be stated).—Names and residences of persons accommodated.—Place where contracted.—Whether claim is disputed.—Whether liability was contracted as to or joint contractor, or with any other person; and, if so, with whom.

Amount due or Claimed.
Dollars Cents

None

Total

T. J. Smith

Petitioner

Oath to Schedule A

UNITED STATES OF AMERICA,

DISTRICT OF Arizona
STATE OF Arizona
COUNTY OF Maricopa ss.

I, T. J. Smith, the person whose name subscribed to the foregoing schedule, do hereby make solemn oath that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

T. J. Smith

Petitioner

Subscribed and sworn to before me this 12th day of March, 1942.

My commission expires:

October 24, 1949

John W. Berlin
Notary Public

(Official Character.)

Schedule B. Statement of All Property of Debtor

SCHEDULE B-1.

Real Estate

Location and Description of all Real Estate owned by Debtor, or held by him, whether under deed, lease or contract.—Incum-
brances thereon, if any, and date thereof.—Statement of particulars relating thereto.

Estimated value of
Debtor's Interest.

Dollars Cents

The southwest quarter of the northwest quarter;
The southwest quarter;
The west half of the southeast quarter;
The southeast quarter of the southeast quarter
of Section 15;
The north half of Section 22, and
All of Section 16;
All in Township 11 South of Range 10 East,
G. & S. R. B. & M., Pima County, Arizona
1,280 acres, \$115,000.00, subject to
mortgage as set forth in Schedule A-2

\$90,149.90

Total

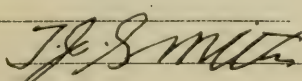
\$90,149.90

J. F. Smith

Petitioner

(7)

SCHEDULE B-2
Personal Property

	Dollars	Cents
Cash on hand		500.00
Negotiable and non-negotiable instruments and securities of any description, including stocks in incorporated companies, interests in joint stock companies, and the like (each to be set out separately)		
None		
Stock in trade, in _____ business of _____, of the value of _____		
None		
Household goods and furniture, household stores, wearing apparel and ornaments of the person		7,000.00
Total		7,500.00
 (8)		Petitioner

SCHEDULE B-2—Continued
Personal Property

E.—Books, Prints, and Pictures

Dollars Cen

\$1,000.00

F.—Horses, Cows, Sheep, and other animals (with number of each)

2 cows, 2 horses

700.00

G.—Automobiles and other Vehicles

1 Ford Tudor Sedan, 1939 Model

600.00

1 Ford Pick Up, 1940 Model

600.00

H.—Farming Stock and Implements of Husbandry

12,000.00

Total \$14,900.00

J. J. Smith
(9)

Petitioner



SCHEDULE B-2—Continued

Personal Property

I.—Shipping, and Shares in Vessels

Dollars Cents

None

J.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated

Irrigation pumps, engines and equipment

\$35,000.00

K.—Patents, Copyrights, and Trade-Marks

None

L.—Goods or personal property of any other description, with the place where each is situated

None

Total \$35,000.00

J. F. Smith

Petitioner

(10)

SCHEDULE B-3

Choses in Action

Debts Due Petitioner on Open Account

Dollars Cents

Triple A (Agricultural Adjustment Administration)

\$ 1,000.00

Note: The above credit due petitioner is cancelled by credit on the crop insurance due Triple A.

Policies of Insurance

None

Unliquidated Claims of every nature, with their estimated value

Judgment in favor of T. J. Smith against Arthur Pinner, Jr., in the amount of \$32,002.00 as set forth in Schedule A-3 as offset, now on appeal in Supreme Court

32,002.00

\$12,964.00 taken by Arthur Pinner Jr., of the funds of T. J. Smith under garnishment and applied on the judgment set forth in his favor and against Smith in Schedule A-3 subject to refund in case the Supreme Court reverses the judgment

12,964.00

Claim of T. J. Smith vs. Arthur Pinner, Jr., and U. S. Fidelity & Guaranty Co. for \$123,230.28 for additional work outside construction contract 1942. (Disputed in litigation, Cause #447, U. S. District Court, Phoenix)

123,230.28

Deposits of Money in Banking Institutions and Elsewhere

(C- Con't) Claim of breach of warranty, unliquidated, of Arizona Equipment Sales, Inc., 733 North 19th Avenue, Phoenix, Arizona,

20,000.00

D- None

Total 188,196.28

T. J. Smith

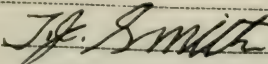
(11)

Petitioner

SCHEDULE B-4.

property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge.

B.—A particular description of each interest must be entered, with a statement of the location of the property, the names of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as known to the debtor.

GENERAL INTEREST.	PARTICULAR DESCRIPTION.	Estimated Value of Interest.	
		Dollars	Cents
Interest in Land			
Interest in Personal Property			
Interest in Money, Stock, Shares, Bonds, Annuities, etc.			
Powers, Legacies and Bequests			
Total			
Property heretofore conveyed for benefit of creditors.		Amount realized as proceeds of property conveyed	
<p>of debtor's property conveyed by deed of assignment, or otherwise, for the benefit of creditors; of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, as far as known to debtor.</p>			
Attorney's Fees.			
<p>sums paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.</p>			
M. C. Burk and John W. Corbin		\$500.00	
Total		\$500.00	
		Petitioner	
(12)			

SCHEDULE B-5.

Property claimed as exempt from the operation of the act of Congress relating to bankruptcy.

(N. B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.)

Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption.

Valuation
Dollar Cents

Property claimed to be exempt by State laws, with reference to the statute creating the exemption.

Home of petitioner and his family carved out of the property described with the family dwelling thereon to be selected by the petitioner with the land on which it is situated of the appraised value of

\$4,000.00

Necessary household table and kitchen furniture belonging to the family including their furniture, rugs, carpets, wearing apparel, bedding and bedsteads, and etc.

Tools and implements, farming utensils, two horses, two cows, and the feed and grain necessary for care of such livestock and plaining and raising of crops

Motor vehicles - Ford Pick Up and Ford Tudor Sedan

Necessary equipment for irrigation farming

Total \$4,000.00

L. J. Smith

Petitioner

(13)

SCHEDULE B-6.

Books, Papers, Deeds and Writings relating to Debtor's Business and Estate

following is a true list of all books, papers, deeds and writings relating to petitioner's trade, business, dealings, estate
acts, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody
ontrol, or which are in the possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or
age; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's cus-
or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their
of the same.

**Ledgers, journals and accounts of petitioner of
his business transactions**

Dollars Cents

**Deed to the property described in Schedule B-1, Real
Estate**

**Receipts and statements of accounts payable and
accounts to be paid; automobile titles; fire insurance
policies; etc.**

T. J. Smith

Petitioner

Oath to Schedule B

UNITED STATES OF AMERICA.

STATE OF Arizona }
COUNTY OF Maricopa } ss.
CITY OF Maricopa }

T. J. Smith

the person who subscribed to the
ing schedule, do hereby make solemn oath that the said schedule is a statement of all my property,
d personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of
nowledge, information, and belief.

T. J. Smith

Petitioner

subscribed and sworn to before me this 18th day of March, 1947.

My commission expires: John W. Carlson
Notary Public

October 24, 1949

(Official Character.)

In the District Court of the United States
for the District of Arizona

B-525-Tucson

In the Matter of
T. J. SMITH, Debtor.

ORDER APPROVING DEBTOR'S PETITION
AND REFERRING MATTER TO CONCIL-
IATION COMMISSIONER

At Tucson, in said District, on the 24th day of March, 1947, before the Honorable Howard C. Speakman, Judge of said Court, the petition of T. J. Smith praying for an opportunity to effect a composition or extension of time to pay his debts in accordance with the provisions of Section 75 of the Bankruptcy Act as amended having been heard and considered,

It Is Ordered that said petition be, and hereby is, approved as filed in good faith and as properly filed under said section, and this cause is referred generally to C. R. McFall, Conciliation Commissioner, for further proceedings.

Entered this 24th day of March, 1947.

HOWARD C. SPEAKMAN,
Judge.

[Endorsed]: Filed March 24, 1947. [23]

[Title of District Court and Cause.]

NOTICE OF
FIRST MEETING OF CREDITORS

To the creditors of T. J. Smith, of Marana, in the
county of Pima, and district aforesaid:

Notice is hereby given that on the 24th day of March A. D., 1947, the petition of the said T. J. Smith, praying that he be afforded an opportunity to effect a composition or an extension of time to pay his debts under Section 75 of the Bankruptcy Act, was approved by this court as properly filed under said section; and that the first meeting of his creditors will be held at the Grand Jury Room of the United States District Court, Federal Building, Tucson, Arizona, on Wednesday, the 9th day of April, A. D., 1947, at ten o'clock in the forenoon, at which time the said creditors may attend, prove their claims, examine the debtor, and transact such other business as may properly come before said meeting.

Creditors will further take notice that at said time and place the following additional matters will also be heard, considered and acted upon:

(1) The matter of exemptions to which the debtor is entitled under the law;

(2) Any proposal for composition or extension which the debtor desires to submit;

(3) The farmer's proposal for leave or approval of the Court to continue his farming operations for

the season 1947-48 under share crop lease or agreement with one Cecil Payne, of Marana, Arizona, and to plant, grow and dispose of a cotton crop or other crops on and from his farming lands during said season to immediately arrange for the financing of said operations and to pledge such crops as security for money advanced for such purposes, to provide for repayment of such advances, and to consider any other similar proposal for the maintenance and operation of said farm during the coming season, and the terms and conditions thereof.

C. R. McFALL,
Conciliation Commissioner.

In the District Court of the United States for the
District of Arizona, Office of Conciliation Commissioner, 402 Valley National Building,
Tucson, Arizona.

IN PROCEEDINGS FOR A COMPOSITION
OR EXTENSION

In the Matter of
T. J. SMITH, Debtor.

No. B-525-Tucson.

SUMMARY OF INVENTORY, STATEMENT
OF INDEBTEDNESS AND LIST OF
CREDITORS

Creditors Will Further Take Notice that the fol-

lowing is a summary of the inventory filed by the above named debtor:

Real estate	90,149.90
Farming stock and implements.....	12,000.00
Livestock	700.00
Household goods	7,000.00
Automobiles and other vehicles.....	1,200.00
Cash on hand.....	500.00
Books, prints and pictures.....	1,000.00
Machinery, fixtures and tools.....	35,000.00
Unliquidated claims	188,196.28
Property in reversion, remainder, expectancy or trust.....	500.00
Property claimed as exempt.....	4,000.00

Further that the following is a statement of the debtor's indebtedness as shown by the schedules:

Taxes	16,766.44
Wages	215.00
Secured claims	24,850.10
Unsecured claims	118,358.87

The names and addresses of the creditors to whom priority is secured by law and the amount owing to each are:

C. M. Brady, c/o Johannessen & Durand Co., First Nat'l. Bank Bldg., Phoenix, Ariz., for wages or salary	215.00
United States, c/o Mr. Frank Flynn, United States Attorney, Federal Bldg., Phoenix, Ariz., for taxes....	15,909.44

(This is total of the claim remaining of record; this amount was included in a judgment entered in the Superior Court of Maricopa County in favor of the United States and against T. J. Smith, Warren M. and Lewis N. Tenney, and Arthur Pinner, Jr., which judgment was paid in full and accepted by the U. S. officials but final settlement has not been accepted by the Commissioner of Internal Revenue. We are informed that it contains certain penalties which they will not waive in the approximate amount of \$574.21 which may be a final liability.) [25]

County of Pima, State of Arizona, c/o County Treasurer and Ex Of- ficio Tax Collector, Tucson, Ari- zona, for Taxes	857.00
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The names and addresses of the secured creditors and the amount owing to each are:

L. M. White, 2950 E. 1st St. Tucson, Ariz.	24,850.00
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The names and addresses of the unsecured creditors and the amount owing to each are:

Fred Tregaskes and Edell, 933 N. Stone Ave., Tucson, Ariz.....	628.00
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Arizona Fertilizer Co. c/o Messrs. Jennings, Strouss & Trask, Attor- neys at Law, Title & Trust Bldg., Phoenix, Ariz.	1,103.64
Marsh & Franklin, Sky Harbour Airport, Phoenix, Arizona.....	160.00
Tucson Realty & Trust Co. 2 S. Stone, Tucson, Arizona	528.10
Allison Steel Company, P. O. Box 2151, Phoenix, Arizona.....	10,022.51
Shell Chemical Company, 2300 Grand Ave., Phoenix, Arizona.....	334.06
Allan K. Perry, First Nat'l Bank Bldg., Phoenix, Arizona	3,796.47
Warren M. and Lewis N. Tenney, c/o Jennings, Strouss & Trask, Phoenix, Arizona	10,000.00
City of Phoenix, c/o Mr. Jack Chois- ser, City Attorney, City Hall, Phoenix, Arizona	2,500.00
Phelps-Dodge Mercantile Co., c/o Messrs. Evans, Hull, Kitchel, Ryley & Jenckes, Attorneys at Law, Title & Trust Bldg., Phoe- nix, Arizona	436.39
Arthur Pinner, Jr., c/o/ Messrs. Moore, Romley, & Roca, Attorneys at Law, Title & Trust Bldg., Phoe- nix, Arizona	79,622.70
Belyea Trucking Co., 6800 S. Ala- meda St., Los Angeles, Califor- nia — Disputed	700.00

Messrs. Jennings, Strouss & Trask, Attorneys at Law, Title & Trust Bldg., Phoenix, Arizona — Dis- puted	2,100.00
Wid Coffin, c/o Mr. Ben C. Hill, At- torney at Law, 77 N. Court, Tuc- son, Arizona—Disputed	6,400.00

C. R. McFALL,
Conciliation Commissioner.

[Endorsed]: Filed March 29, 1947. [26]

[Title of District Court and Cause.]

NOTICE OF
ADJOURNED MEETING OF CREDITORS

To the creditors of T. J. Smith, of Marana, in the
County of Pima, and District aforesaid:

Notice is hereby given that the first meeting of
creditors was held and proceedings had on April 9,
1947, and upon application of the debtor, further
proceedings were continued until Tuesday, April
15, 1947, at two o'clock p.m. at the Grand Jury
Room of the United States District Court, Federal
Building, Tucson, Arizona; that at said time and
place last mentioned, consideration of the matters
and things mentioned in the Notice of the First
Meeting of Creditors will be resumed and further
proceedings had in connection therewith.

C. R. McFALL,
Conciliation Commissioner.

Dated, April 9, 1947.

I, C. R. McFall, Conciliation Commissioner, do hereby certify that on April 10, 1947, I mailed each of the creditors of the above named debtor named in the schedules filed herein, and to other persons as shown by the mailing list attached hereto to the addresses of each as they appear in said schedule and/or mailing list in sealed and penalty envelopes at the Post Office in the City of Tucson, Pima County, Arizona, a copy of the foregoing notice.

C. R. McFALL,
Conciliation Commissioner.

[Endorsed]: Filed April 18, 1947. [27]

[Title of District Court and Cause.]

AMENDMENT TO
SCHEDULES A-2 AND B-2 H

Comes now the debtor, undersigned, and asks leave to: Amend Schedule A-2 by correcting the indebtedness claimed by L. M. White and shown on said schedule as \$23,000.00 to the correct sum of \$26,000.00 with interest at 6 per cent per year for nine months.

Amend and correct Schedule B-2 H by adding thereto the following:

- 1 Model M International Tractor
with four row cultivator attach-
ment at the value of \$2,000.00

That the summaries as shown in said schedules be

changed to conform to these amendments and corrections.

/s/ T. J. SMITH,
Petitioner.

United States of America, District of Arizona,
State of Arizona, County of Maricopa—ss.

I, T. J. Smith, the petitioning debtor mentioned in the foregoing petition, do hereby make solemn oath that the statements contained herein are true according to the best of my knowledge, information, and belief.

T. J. SMITH.

Subscribed and sworn to before me this 15th day of April, 1947.

[Seal] JOHN W. CORBIN,
Notary Public.

My commission expires: October 24, 1949.

[Endorsed]: Filed April 18, 1947. [28]

[Title of District Court and Cause.]

FINAL INVENTORY

At Tucson in said District on this 15th day of April, 1947:

The undersigned Conciliation Commissioner for the County of Pima does hereby find that the following is a Final Inventory of the estate of the aforesaid T. J. Smith; that in the preparation of such inventory I have taken the inventory filed by

the debtor, both as to items and valuations; that no creditors' committee was appointed or requested by the creditors for the purpose of submitting a Supplementary Inventory, and no such supplementary inventory was submitted by any creditor or creditors:

Assets and property of the debtor as set forth and itemized in his schedules B-1, 2 and 3 annexed to his Petition for Composition or Extension, filed in this pro- ceeding	\$188,196.28
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And in addition to the above property, one Model M Interna- national Tractor with four-row cultivator attached, as per amendment of Schedule A-2 filed with the Conciliation Com- missioner, April 15, 1947.....	2,000.00
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Total	\$190,196.28
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C. R. McFALL,
Conciliation Commissioner.

[Endorsed]: Filed April 18, 1947. [29]

[Title of District Court and Cause.]

PROCEEDINGS OF C. R. McFALL,
CONCILIATION COMMISSIONER

1947

- Mar. 24—Received Petition and Schedules of Debtor Letter to attorney for debtor requesting additional information as to addresses of creditors.
- Mar. 26—Conference and consultation with debtor and his attorney.
- Mar. 27—Prepare and file mailing list of creditors and other interested parties.
- Mar. 28—Received and filed debtor's petition for leave to carry on farming operations and to arrange for financing, etc.
- Mar. 28—Order First Meeting of Creditors to be held April 9, 1947, at 10 o'clock in the Grand Jury Room of the U. S. District Court, Federal Building, Tucson, Arizona.
- Mar. 28—Mail notice of first meeting of creditors to all creditors and other interested parties as shown by schedules and mailing list on file.
- Mar. 29—Public Notice of First Meeting of Creditors in Arizona Daily Star.
- Apr. 3—Letter from M. C. Burk, attorney, and inventory of farming equipment, improvements and fixtures.
- Apr. 9—Order Setting Apart Exemptions.

C. R. McFALL,

Conciliation Comm. [30]

[Title of District Court and Cause.]

Minutes of First Meeting of Creditors

At Tucson in said District upon this 9th day of April, 1947, before the undersigned Conciliation Commissioner for Pima County, Arizona, the first meeting of creditors in the above case was had, of which meeting due notice was given to creditors by publication in the Arizona Daily Star, a newspaper of general circulation printed and published in Tucson, Arizona, and by mail, as required by law, and the undersigned sat at the time and place mentioned in said notice, to preside at the examination of the debtor and for such further proceedings as were referred to in the Notice of said meeting, and as may be taken according to law.

Annette Freeman was duly sworn to act as official court reporter of the proceedings.

The debtor, T. J. Smith, was present in person and with his wife, Mrs. T. J. Smith, and his attorney, John W. Corbin, Industrial Bldg., Phoenix, Ariz.

There were present and represented at said meeting, creditors as follows:

Wid Coffin by his attorneys, Ben C. Hill, 77 North Court, Tucson, Arizona, and Ashby I. Lohse, 127 North Stone, Tucson, Arizona;

Warren M. and Lewis N. Tenney and Messrs. Jennings, Strouss & Trask by their attorney, Henry Stevens, 619 Title & Trust Bldg., Phoenix, Arizona;

L. M. White by his attorneys, Ralph W. Bilby and Arthur Henderson of the firm of Knapp,

Boyle, Bilby & Thompson, Valley National Building, Tucson, Ariz.

The following claims were filed and tentatively allowed:

Allan K. Perry, First Nat'l Bank Bldg., Phoenix, Arizona — Unse- cured	\$ 3,796.47
Louis E. Young, Pima County Treasurer, Tucson, Arizona—Se- cured	879.03
Arizona Fertilizers, Inc., M. F. Wharton, Treasurer, c/o Mr. I. A. Jennings, Messrs. Jennings, Strouss & Trask, Attorneys at Law, Title & Trust Bldg., Phoenix, Arizona, Unsecured	1,103.64
Warren M. and Lewis N. Tenney, c/o Mr. I. A. Jennings, Messrs. Jennings, Strouss & Trask, Attor- neys at Law, Title & Trust Bldg., Phoenix, Ariz., Unsecured	10,000.00
I. A. Jennings, Messrs. Jennings, Salmon & Trask, Attorneys at Law, Title & Trust Bldg., Phoe- nix, Arizona, Unsecured	2,159.00

The debtor was duly sworn and examined and offered in evidence in connection with his testimony, Exhibits A and B, being proposed budgets for his farming operations for 1947.

Due to the untimely death of Mr. Milton Burk, one of the attorneys for the debtor, among other

reasons, the debtor was unable to submit a definite proposal for composition or extension, and Mr. Corbin, attorney for the debtor, requested additional time for the preparation of the same and submission to creditors, and requested that further proceedings on this First Meeting of Creditors be adjourned to a later date. His request was granted, and thereupon the undersigned Commissioner ordered that this First Meeting of Creditors be adjourned for further proceedings until April 15, 1947, at two o'clock p.m. at the Federal Grand Jury Room of the United States District Court, Federal Building, Tucson, Arizona.

The debtor was directed to submit any corrections or changes in his schedules, either of assets or liabilities, at that time, and the creditors were notified to submit necessary proof that their claims are free from usury as defined by the laws of Arizona, as required by Sec. 75(i) of the Bankruptcy Act.

All matters mentioned in the Notice of the First Meeting of Creditors and any other matters which may properly be considered in connection with the same or with the petition herein are therefore continued until the time and place aforesaid.

C. R. McFALL,
Conciliation Commissioner.

1947

April 15, 1947—Received and filed statements relative to usury concerning the claims of: Jennings, Salmon & Trask, Tenney and Tenney, Arizona Fertilizers, Inc.

Minutes of Adjourned
First Meeting of Creditors

This matter came on for further hearing this 15th day of April, 1947. Annette Freeman, the court reporter heretofore duly sworn to act, was present and took the proceedings in shorthand. The debtor, T. J. Smith, was present in person and with his wife, Mrs. T. J. Smith, and his attorney, Mr. John W. Corbin. Mr. Ben C. Hill and Mr. Ashby I. Lohse appeared for the creditor, Wid Coffin. Mr. Ralph W. Bilby and Mr. Arthur Henderson of the firm of Knapp, Boyle, Bilby & Thompson appeared for the creditor, L. M. White.

The debtor submitted a petition for proposed extension of the time for payment of his debts, which was received and filed. The debtor also submitted an amendment to Schedules A-2 and B-2-h, which was received and filed, to which is attached an itemized statement of farm equipment, household effects and buildings, which was also received and filed.

The debtor through his attorney then stated for the record that he would be unable to obtain the approval of his proposal for extension by a sufficient number of his creditors to comply with the requirements of the Bankruptcy Act under which his petition was filed herein.

The debtor was further examined by counsel

present and by the Commissioner. Whereupon, L. M. White, secured creditor, by his attorneys, Ralph W. Bilby and Arthur Henderson, objected to the jurisdiction of the Court or to any further proceedings herein, upon the ground and for the reason that the debtor has not shown in this proceeding that he is a farmer within the meaning of the Act and that the Court has no jurisdiction to entertain further proceedings in this matter for that reason.

This proposition was allowed by counsel.

Whereupon, this matter was submitted to the Commissioner for report to the District Court.

April 15, 1947—Filed Final Inventory.

April 17, 1947—Report and Certificate to District Judge. [33]

April 18, 1947—Expenses incurred to date:

21 packages legal-size envelopes \$ 1.35

Mimeographing envelopes and 200 Notices of First Meeting of Creditors, and Summary of Inventory with List of Creditors (E. E. Gill) 8.85

Publication—Arizona Daily Star. Notice First Meeting of Creditors 6.82

\$17.02

C. R. McFALL,
Conciliation Commissioner.

CERTIFICATE OF COMMISSIONER

State of Arizona,
County of Pima—ss.

I hereby certify that the foregoing memorandum is made as my record of proceedings in the above entitled matter.

Dated, April 18, 1947.

C. R. McFALL,
Conciliation Commissioner.

[Endorsed]: Filed April 18, 1947. [35]

[Title of District Court and Cause.]

REPORT AND CERTIFICATE
TO THE JUDGE

To the Hon. Howard C. Speakman, United States
District Judge:

I, the undersigned Conciliation Commissioner, to whom was referred the matter of T. J. Smith, Debtor, hereby certify that in the administration thereof, meetings of creditors were held before me in the Grand Jury Room of the above Court at Tucson, on April 9, 1947, and on April 15, 1947, for the purpose of considering the debtor's proposals for composition or extension.

I further certify that the debtor was unprepared to submit any proposal at the first meeting of the creditors and requested additional time within which to formulate such a proposal and obtain the

necessary consent of his creditors, which motion was granted, and the matter was continued until April 15. That on April 15, 1947, the debtor filed a Proposal for Extension and at the same time stated that he was and would be unable to obtain acceptance in writing by a majority in number and amount of both secured and unsecured creditors to such proposal, and I thereupon declared the offer not accepted.

That at the meetings of said creditors the secured creditor, L. M. White, and Tucson Realty and Trust Co., a non-secured creditor, objected to the proceedings upon the ground that the Court was without jurisdiction to proceed under Section 75 of the Bankruptcy Act in this matter, for the reason and upon the ground that the debtor had failed to prove that he was a farmer and entitled to the benefits of said Act.

As the record now stands, your Conciliation Commissioner is of the opinion that he has no authority or power to determine the jurisdictional question presented and hence makes no findings or conclusions in reference thereto. 8 C.J.S., Par. 766, p. 1742, Note 25. [36]

Wherefore, the Debtor having failed to obtain the necessary acceptances of his proposal by both the secured and unsecured creditors, as required by the Act, this certificate is filed for the information of the Court and for such further action as may be taken according to law.

I transmit herewith as a part of this certificate,

the papers and records filed with me, together with my record of proceedings, to date.

April 17, 1947.

Respectfully submitted,
C. R. McFALL,
Conciliation Commissioner.

Copy of foregoing Report and Certificate mailed to John W. Corbin, Industrial Bldg., Phoenix, Ariz., Attorney for Debtor, this April 18, 1947.

C. R. McFALL,
Conciliation Commissioner.

[Endorsed]: Filed April 18, 1947. [37]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

C. R. McFall, Conciliation Commissioner, having filed herein his Report and Certificate to the Judge, and it appearing therefrom that a meeting of creditors was held in this matter on April 15, 1947, for the purpose of considering the debtor's proposals for composition or extension and that at said meeting certain creditors objected to these proceedings upon the ground that the Court was without jurisdiction to proceed under Section 75 of the Bankruptcy Act in this matter for the reason that the petitioner, T. J. Smith, is not a farmer within the meaning of said Section 75, and

It further appearing to the Court that it is

necessary to dispose of said objections and to determine the question of whether or not the court has jurisdiction in this matter, and

It further appearing to the court that it is necessary to take evidence upon which the court can determine such question,

It Is Therefore Ordered that T. J. Smith, petitioner herein, appear before this court on the 14th day of May, 1947, at the hour of ten o'clock a.m., to show cause why the objection to the jurisdiction of this court should not be sustained and the case dismissed upon the ground and for the reason that said petitioner is not a farmer within the meaning of Section 75 of the Bankruptcy Act.

Dated at Tucson, Arizona, April 22, 1947.

HOWARD C. SPEAKMAN,
United States District Judge.

[Endorsed]: Filed April 2, 1947. [38]

[Title of District Court and Cause.]

MEMORANDUM

On behalf of L. M. White, the undersigned attorneys file the following memorandum in support of the position of the secured creditor, that the debtor in this matter is not a farmer entitled to the benefits covered by Section 75 (s) of the Bankruptcy Act.

The testimony of the debtor conclusively shows

that he was a contractor during the period from 1942 to 1945. While he was a contractor, he leased his farm in 1944. It further appears from the record that a great portion of the debts listed by the debtor are debts arising out of the contracting business. The question, therefore, is whether a man can be a farmer for several years and then enter a separate and completely distinct business, such as contracting for a period of a few years, incur large debts during the time he is engaged in such separate and distinct business, then return to farming and not long after such return file his petition under the provisions of the Bankruptcy Act in question and ask that he be given the benefits of the Act in such manner that the creditors of his contracting business would suffer the delays incident to the procedure under the Agricultural Composition and Extension Provisions of the Bankruptcy Act.

When this Act was extended in 1944 the House Committee on the Judiciary in Report 1127 of February 15, 1944, said that [39] the purpose of the Act was:

“It was designed to relieve distressed farmers who were in default in their farm mortgages and to relieve agriculture from the effects of the deflation in land values resulting from the depression.”

The history of the Act and the language of the Act makes it clear that Congress never intended that a person might engage in a wholly separate and distinct business, incur large indebtedness, and

then return to a farming business in such manner as to avoid or postpone payment of all indebtedness incurred in the separate and distinct business. For the report of the House Committee see:

U. S. Code Congressional Service 1944, page 974.

The courts have specifically said that the words of the statute have a color and content that may vary with the setting. See:

Bank vs. Beach, 81 Law Edition, 1206, 301 U. S. 435;

Benitez vs. Bank, 109 Fed. 2d 194, 313 U. S. 270.

For this reason no one case can be taken as a governing precedent for a decision of another in this field unless the evidence upon which the court acted in the case cited as precedent can be fully gathered from the decision. Debtor's attorney cites the Stoller case as controlling here. We submit that the Stoller case is explainable upon the theory that the business in which the debtor was there engaged was not a business wholly disassociated from farming. It seems apparent that a farmer might engage in a related business such as a seed business or a fertilizing business without losing his status as a farmer, but we cannot understand how a farmer might enter a wholly distinct and different type of business, incur debts in that business, and then attempt to use his status as a farmer to postpone payment of such debts.

In our search we have been unable to find any case exactly in point in this matter, and we must rely upon the evident intention of the Act as shown from the history of the Act and the clear provisions of the Act itself.

The Act is fully annotated on the particular problem here in:

99 ALR 1378; 112 ALR 1467, and 126 ALR 678.

The history of the Act is recited at some length in the case of: *In re McGrew*, 126 Fed. 2 676.

An interesting case in which the court sought to define the purpose of the act is *In re Christy*, 50 Fed. Supp. 78 later followed *In re N. H. Co.*, 62 Fed. Supp. 22. These cases hold that the Act cannot be used as a subterfuge to escape liability on obligations incurred in other businesses. The court likens such attempt to the attempt made during the war by parents to have their sons classified as "farmers" to evade the draft by purchase of a farm to be operated by such draft evaders.

The burden of proof is on the debtor to show that he is a farmer within the purview of the Act. See:

McNutt vs. Company, 80 Law Edition 1135,
and *Livestock Company vs. Bank*, 122 Fed.
2d 193.

On behalf of the creditor, L. M. White, it is submitted that the debtor in this case has not sustained the burden of proof necessary to show that he is a person entitled to the benefit of this Act.

We have filed with this brief a transcript of the examination of the debtor at the first hearing on April 9, 1947, and at the adjourned meeting on April 15, 1947. We have also filed with this memorandum the certified copy of the Contractor's License issued to the debtor in 1942. The transcript and the license show beyond any reasonable doubt that the debtor incurred substantially all of the indebtedness shown on his schedule by his unsuccessful venture in the contracting business. The creditor respectfully requests the court if there is any doubt on this point, that a further hearing be had at which independent evidence will be submitted by the creditor showing that the debtor Smith personally engaged in the contracting business during the period in question and carried on such business all during the period.

For the reasons given, the creditor submits that the court should dismiss the debtor's petition.

Dated this 2nd day of June, 1947.

KNAPP, BOYLE, BILBY &
THOMPSON,
ARTHUR HENDERSON,
Attorneys for Creditor,
L. M. White. [42]

Office of the Registrar of Contractors
State of Arizona
(Certified Copy)

License No. 5813.

Signature of Licensee:

/s/ T. J. SMITH.

State of Arizona,
Office of the Registrar—ss.

To All Whom It May Concern:

This is to Certify that T. J. Smith having been shown to be possessed of all the necessary qualifications, and having complied with all the requirements of the law, was, by an order of the Registrar of Contractors, made and entered of record on the 26th day of August, in the year of Our Lord One Thousand Nine Hundred and Forty-Two, duly licensed and admitted to engage in and pursue the business of General Engineering Contractor (Class A-1-3-5-6) in the State of Arizona.

Given under my hand and the seal of the Registrar of Contractors in my office in the City of Phoenix, the seat of Government, this 27th day of May, 1947.

[Seal]

MORGAN G. PRATT,

Registrar of Contractors.

Note: This license is not transferable and expires on the thirtieth day of June, 19....

Chapter 102, Session Laws 1931, Regular Session.

In the District Court of the United States for the
District of Arizona

No. B-525-Tucson

In the Matter of

T. J. SMITH, Debtor.

Hearing on first meeting of creditors of T. J. Smith, Debtor, held at the Grand Jury Room of the United States District Court, Federal Building, Tucson, Arizona, on Wednesday, the 9th day of April, 1947, at ten o'clock in the forenoon before C. R. McFall, Conciliation Commissioner.

The following were present:

John W. Corbin, Attorney for Debtor.

T. J. Smith, Debtor.

Mrs. T. J. Smith, Debtor's wife.

Ben C. Hill, Attorney representing Wid L. Coffin.

Ashby Lohse, Attorney representing Wid L. Coffin.

Henry Stevens, of counsel for Jennings, Strouss & Trask, Attorneys for Warren M. and Lewis N. Tenney.

Ralph W. Bilby, of counsel for Knapp Boyle Bilby & Thompson, Attorneys for L. M. White.

Arthur Henderson, of counsel for Knapp Boyle Bilby & Thompson, Attorneys for L. M. White. [45]

Cross-Examination of

T. J. SMITH

Debtor

By Mr. Bilby:

Q. Where do you live?

A. I live in Marana.

Q. That is a ranch or farm? A. Yes.

Q. How long have you been living there?

A. Since 1938.

Q. Continuously? A. Yes.

Q. You have never lived anywhere else during that time?

A. No—well, not since I moved back from Phoenix.

Q. When did you move up from Phoenix?

A. I moved back from Phoenix in 1937.

Q. 1937. You have lived on the ranch continuously? A. That's right.

Q. Have you ever had an office in Phoenix?

A. Yes.

Q. Have you one there now? A. No.

Q. When did you abandon your office in Phoenix? A. About a year ago.

Q. Where was that office?

A. In the Luhrs Building.

Q. How long did you have an office in the Luhrs Building?

A. Possibly a year, a year and a half—all those lawsuits coming on—let's see, about a year and a half.

Q. Did you have an office for the lawsuits? [46]

A. That's right.

(Testimony of T. J. Smith.)

Q. That is what you had it for?

A. That's right.

Q. In order to carry on the lawsuits?

A. That's right.

Q. Did you carry on any other business out of that office?

A. I was doing some work, contract work.

Q. How long were you in the contracting business?

A. Oh, I went out of business in 1937.

Q. Was it in 1937? A. I sold it.

Q. How long were you in it?

A. Well, I started back in about 1935.

Q. Then how long did you stay in it, from 1935 on? A. Up to 1943.

Q. Up to 1943?

A. Yes, I sold the equipment and whatever I had.

Q. When did you sell the equipment?

A. I believe it was 1943.

Q. To whom?

A. To the Stanislaw Company in California.

Q. You have been paid for it?

A. Yes. You are talking about cats?

Q. I am talking about the equipment, the same thing you are talking about. I don't know what it was you owned.

A. That's the contracting equipment.

Q. Have you sold all your contracting equipment? A. Yes. [47]

(Testimony of T. J. Smith.)

Q. You sold it all to these people you just mentioned? A. That's right.

Q. What have you been doing with an office in Phoenix in the last two years?

A. I told you, carrying on lawsuits.

Q. Did you need an office to carry on lawsuits?

A. The last 18 months I haven't had one.

Q. You said you closed it a year ago.

A. Eighteen months I told you.

Q. You said you had it for how long? During what period of time did you have an office in Phoenix? A. You want to know the date?

Q. That's the reason I am asking you, yes.

A. Then give me a little time. I will look it up and give it to you.

Q. Do you know it?

A. Yes, by going to the record.

Q. Do you know it without going to the records?

A. No.

Q. Do you have any idea when you had your office in Phoenix?

A. If you want the exact date, tell me and I will go to the records and get that.

Q. As near as you can. A. I don't know.

Q. Do you know whether it was in 1945 or '46?

A. I don't remember.

Q. Or in 1944? A. I don't remember.

Mr. Bilby: Obviously, Mr. Conciliator, he is avoiding the question. [48]

Mr. Corbin: Well, I object. The question is immaterial.

(Testimony of T. J. Smith.)

Mr. Bilby: Very material.

Mr. Corbin: Two years ago or three, something like that.

Mr. McFall: Well, he is trying to fix the time that he gave up his office in Phoenix.

Mr. Bilby: That's right.

Mr. McFall: I think that's a proper question.

Mr. Bilby: And I think he knows, within a reasonable time.

Q. Do you know when you gave up your office in Phoenix?

A. I answered the question to the best of my ability.

Q. Will you answer it again. Tell us when did you give that up?

A. About eighteen months ago.

Q. How long did you have it?

A. I don't remember the exact date.

Q. Well, approximately how long?

A. I don't remember the exact date.

Q. Was it two years, three years?

A. I don't remember. I will get the record and give you a statement on that if that is what you want.

Q. You say under oath you don't remember how long you had an office there?

A. Not definitely.

Q. Well, approximately?

A. I don't remember definitely how long.

Q. Give me the approximate date.

A. It's possibly two years—three.

Q. Now, during that time that you have had

(Testimony of T. J. Smith.)

that, two or [49] three years, did you occupy it yourself?

A. Now, what are you talking about, me individually or the contracting company?

Q. Yes. Were you up there individually in the office?

A. Yes, I had an office—I had an individual office there for a while.

Q. What business were you engaged in up there at that time? A. I told you, contracting.

Q. And what contracts did you have?

A. I can look up the records and see.

Q. Government contracts, with the government?

A. Not in the individual office there, no.

Q. Did you at that time have government contracts? A. Yes.

Q. I would like to fix the time.

A. We still have litigation.

Q. During the time of your office up in Phoenix?

A. I have litigation over government contracts.

Mr. McFall: I think the purpose of the question is to determine the status of this man as to his farming operations, as to whether he is a farmer. There is no jurisdiction to proceed at all unless the man is a farmer. I think they have the right to inquire into that.

Mr. Bilby: I want to obtain that because I want to know what he was doing.

Q. Did you have substantial contracts during that period of two or three years while you had an office in Phoenix?

A. I was doing tillage work.

(Testimony of T. J. Smith.)

Q. What is tillage work?

A. I don't know. You might get the dictionary and find out what it is.

Mr. Bilby: Do we have to tolerate this? [50]

Mr. McFall: They have the right to ask these questions under the law. Mr. Smith, give them to the best of your ability. You don't have to tell anything you don't know.

Mr. Smith: I don't hesitate giving Mr. Bilby an answer to a question, but he knows what tillage work is.

Mr. Bilby: No, I don't.

Mr. McFall: Even if he did, I think he has a right to ask you.

A. (Answer continued) Tillage work is the way of preparing land for farming.

Q. And you were doing that for other people in the Salt River Valley?

A. I have been in it for 35 years off and on.

Q. Will you answer the question. You were doing that for other people in Salt River Valley?

A. More at Marana—very little at Salt River.

Q. You were doing it for other people for pay?

A. I was doing it for other people, yes.

Q. Did some in the Salt River Valley as well as Marana?

A. I did little in Salt River Valley.

Q. Now, these claims that you list here, of creditors, Marsh & Franklin, Sky Harbour Airport, \$160.00, what was that for?

A. For dusting cotton with an airplane.

(Testimony of T. J. Smith.)

Q. Where was the cotton that was dusted?

A. Up in Marana at the ranch.

Q. At your place? A. Yes.

Q. Allison Steel Company, Phoenix, \$10,022.51?

A. That's for a Diesel motor for the pumping plant.

Q. Is that Diesel motor under mortgage? [57]

A. Is it under mortgage? There is no mortgage on it.

Q. That is not mortgaged to Mr. White?

A. Not that one, no.

Q. Did you turn one in that was mortgaged?

A. No.

Q. That is not mortgaged to anyone?

A. No. I have answered several times.

Q. Allan K. Perry, First National Bank Building, Phoenix, Arizona, \$3796.47. What is that for?

A. That is for attorney's fees.

Q. Incurred in connection with what kind of work?

A. These contracts that I had on these airports.

Q. That was litigation occurring out of your contracts with airports? A. That's right.

Q. Mr. Perry represented you?

A. That's right.

Q. That had nothing to do with your farming?

A. No.

Q. Will you answer it so she can hear you.

A. No, it had nothing to do with the farm.

Q. Warren M. and Lewis N. Tenney, care of Jennings, Strouss & Trask, Phoenix, Arizona, \$10,000.00. What is that for?

(Testimony of T. J. Smith.)

A. That's for the settlement whereby they was to pay certain things, certain things I gave for a judgment, they have paid out on certain litigations and courts.

Q. That was in connection with your contracts?

A. That's right.

Q. It had nothing to do with your farm?

A. No. [52]

Q. City of Phoenix, care of Mr. Jack Choisser, \$2,500. What is that for? A. Who?

Q. City of Phoenix, care of Mr. Jack Choisser, City Attorney, City Hall, Phoenix, Arizona, \$2500.

A. That's in regards to airports, the claim I have just referred to of Tenney's, allowed for 50 per cent of it.

Q. Had nothing to do with your farm?

A. No.

Q. Phelps-Dodge Mercantile Co., \$463.39. That had nothing to do with your farm? That was incurred operating at Douglas? A. That's right.

Q. Arthur Pinner, Jr., care of Messrs. Moore, Romley and Roca, Attorneys at Law, Phoenix, Arizona, \$79,622.70. That is the case that is in court? A. That's right.

Q. That's a suit against you, isn't it, Mr. Smith?

A. That's a suit against—that's a suit against me which is up on appeal in the Supreme Court?

Q. Who is appealing it?

A. Well, you will have to—that's a question the attorney will have to answer.

(Testimony of T. J. Smith.)

Mr. Corbin: Pardon me for laughing. There are four—I think four appeals in that case. Everybody is appealing.

Mr. Bilby: Of course, I don't know anything about it. What I do want to know—all I care about is, this judgment was rendered against Mr. Smith, is that right?

Mr. Corbin: Judgment was rendered in favor of him and judgment was rendered against him.

Mr. Bilby: Well, it's listed here as a claim.

Mr. Corbin: Well, it sets up there some \$32,000 and he got a judgment for \$32,000 and they got a judgment for \$76,000, I think, in the same lawsuit. [53]

Mr. Bilby: Well, the document I got out of court listed it as a claim against Mr. Smith, \$79,000.

Mr. Corbin: That's right, under the schedule it's set up as a credit in there for his judgment against them of \$32,002.

Q. That grew out of your contracting business, didn't it, Mr. Smith?

A. Yes. There is additional moneys in there that the schedule shows.

Q. It had nothing to do with your farm?

A. No.

Q. Belyea Trucking Co., 6800 S. Alameda St., Los Angeles, California, \$700.00, what is that for?

A. That's a disputed claim.

(Testimony of T. J. Smith.)

Q. What is the claim for?

A. I don't exactly know myself.

Mr. Corbin: That's a contract.

Q. It had nothing to do with your farm?

A. No.

Q. Messrs. Jennings, Strouss & Trask, Attorneys at Law, \$2100. What is that for?

A. That's a disputed claim. That's in regard to—I presume that's in regard to some of their services they claim they rendered.

Q. In connection with the contracting business?

A. That's right.

Q. Wid Coffin, \$6,400.00?

A. That's another disputed claim.

Q. In connection with your contracting business? A. Yes.

Q. Has nothing to do with your farm?

A. No. [54]

Q. The only listed claims that have anything to do with your farm then, are Arizona Fertilizer Co., which have anything to do with it?

A. That's right.

Q. What was that for?

A. Arizona Fertilizer? That was for dusting off insects on cotton.

Q. On your farm? A. That's right.

Q. And Sky Harbour, you said, was use of air-planes to dust? A. Applying dust.

Q. What is the Shell Chemical Company?

A. That is fertilizer.

(Testimony of T. J. Smith.)

Mr. Stevens: Which one?

Mr. Bilby: Shell Chemical, \$334.06.

Q. That is for fertilizer used on your farm?

A. That's right.

Q. These are the only claims listed then. Just one more—Fred Tregaskes and Edel. What is that for?

A. That was paint.

Q. Paint used where?

A. On the ranch, on the buildings.

Q. These four claims are the only ones that have anything to do with your farm, aren't they?

Mr. Bilby: I think in fairness to him, he should see the list, but he has already answered.

A. I think that's right.

Q. Now, your assets are listed here, machinery, fixtures and tools. What kind of machinery have you reference to there—\$35,000 machinery and fixtures?

A. That's pumping plant equipment and farming machinery. [55]

Mr. McFall: I may state this, Mr. Bilby, that in this notice, this inventory that the Commissioner sent out, is only in summarized form.

Mr. Bilby: Yes.

Mr. McFall: Some of the items which make up those amounts are listed in the schedules in detail as required by the Act.

Q. That is all farming machinery and equipment?

A. Yes.

Q. You don't have any other?

A. No.

(Testimony of T. J. Smith.)

Q. I have here an item of unliquidated claims, \$188,196.28, that relates to claims growing out of your contracting business, doesn't it, these unliquidated claims?

A. Not all of it, I believe the biggest part of it does; part of it is on some other stuff.

Q. What is the stuff you are claiming—from the Agriculture Products Company? A. No.

Q. What else? Name those that doesn't come out of the contracting business?

A. I have about \$20,000 in there against the Arizona Equipment Sales Corporation.

Q. That has to do with your farming operation? A. That's right.

Q. Then there would be one hundred sixty-eight thousand and some odd dollars that related to your contracting business?

Mr. Corbin: Well, I think the schedule shows—

A. It's outlined in the schedule.

Mr. Bilby: We are not bound by the schedule. May not we ask direct?

Mr. Corbin: I think he ought to have a chance—— [56]

Mr. McFall: If he wants to see the schedules he may.

Mr. Smith: Have you got one of the schdules?

Mr. McFall: Either he will have to get it right here—no doubt your counsel has one.

Mr. Smith: Mr. Corbin, the attorney, knows perhaps as much about it——

Mr. Corbin: No, I don't, I haven't seen it.

(Testimony of T. J. Smith.)

Mr. McFall: On the bottom there, the schedules show that only two items not included in the \$188,000 were \$1,000 for an open account against Agriculture Adjustment Administration and \$20,000 for breach of warranty against Arizona Equipment Sales he just mentioned.

Mr. Stevens: \$1,000 isn't there an offset on that?

Mr. McFall: He has written around that "Credit due petitioner is cancelled with credit on crop insurance."

Q. In connection with your indebtedness, you have taxes also here of \$16,766.44. What kind of taxes are those?

A. That was the withholding tax from the employees on these federal contracts.

Q. And that is in relation to your contracting business and has nothing to do with your farm?

A. No.

Mr. McFall: In order to avoid any misunderstanding there, that's an account—the Commissioner has consolidated these taxes, the state and county, he included in with the item you have in the amount of \$857.

Mr. Bilby: I knew it was a very small amount.

Mr. Smith: That item that you have just mentioned has been paid. This is a penalty they are raising on each entry.

Q. Well, that's the same item that they have a judgment against you in the United States District Court in Phoenix?

(Testimony of T. J. Smith.)

A. That's right. I presume that's what you are talking about.

Mr. Corbin: Mr. Bilby, may I explain that [57] to you, that \$15,000? There is only \$500 of it, some \$500, I think, that's the actual indebtedness, but the United States Government intervened and got a judgment and received the payment for the judgment, and the Commissioner of Internal Revenue wouldn't release the lien. It's a lien on the ranch because they filed it down there. But the Commissioner of Internal Revenue in Washington, D. C., said the state court had no jurisdiction.

Mr. McFall: The original tax grew out of withholding taxes for employees in the contracting business, that's what it is?

Mr. Smith: That's right.

Q. Now, I think you stated at the beginning of your examination by your own counsel here, that you are in error in listing Mr. White's indebtedness as \$24,850, and that should be a principal indebtedness of \$26,000 isn't that right?

A. That's right.

Q. Then there is an installment of interest which was due on the 16th of December, 1946, of \$435 and another installment due on the 16th of March, 1947, for \$435, isn't that right?

A. I don't think that interest is quite \$435.

Mr. Corbin: \$435?

A. (Answer continued) I think it was reduced to about—I don't have the exact amount.

(Testimony of T. J. Smith.)

Q. The Tucson Realty would have a record of that, wouldn't it? A. That's right.

Q. They gave me these figures and then \$475.60 insurance paid. A. Four hundred what?

Q. \$75.60. A. Something like that.

Q. Making a total of \$27,345.60. That sounds about right?

A. I would like to have an opportunity to check on that.

Q. Then you owed on that Tucson Realty some item of \$52? [58]

A. I listed that whole thing as five hundred some odd dollars.

Mr. McFall: \$528.16?

Mr. Smith: Yes.

A. (Answer continued) I didn't list it under White at all.

Mr. Bilby: Mr. White has the right to put it under the mortgage, Mr. Conciliator, and have it included in the lien which he has assumed.

Mr. McFall: Which he has assumed?

Mr. Bilby: Yes, I understand so.

Q. During the time that you were in the contracting business, who was running your farm?

A. I was running it.

Q. Did you have it leased?

A. One year I had it leased out to W. H. Lane.

Q. What year was that?

A. I believe it was in 1944.

Q. And did you have it leased in 1945?

A. Or 1943—I am not sure whether '43 or '44.

(Testimony of T. J. Smith.)

Q. During that year you didn't run it at all?

A. No.

Q. Did you have it leased the next year in 1945?

A. I farmed it in 1945, I believe it was.

Q. Do you have any lease agreement now in connection with it?

A. I have a proposed lease agreement.

Q. With whom?

A. With one Cecil Payne.

Q. Has he been running it?

A. No. He has done some work. There have been no agreements signed. [59]

Q. Your present condition of being unable to meet these obligations is because of obligations arising out of your contracting business, isn't it?

A. Because of certain liens, and I have all those finances to take care of everybody, pay off help, everybody else, put another well on the ranch to develop it, and this federal tax lien in there was the thing, one of the principal things that caused us to not be able to go ahead and refinance it.

Q. That all grows out of your contracting business? A. That's right.

Q. Do you have any other assets not listed in your petition? A. Yes.

Q. What are they?

A. One Model M farm tractor and four row cultivator. That's included in our rent agreements we had. We anticipated turning it to the court, the money.

(Testimony of T. J. Smith.)

Mr. McFall: What assets do you have now that aren't listed again that you just mentioned?

Mr. Smith: One Model M International farmer, and a four row cultivator.

Q. Any other assets not listed? A. No.

Q. You have any cash?

A. I have listed the cash.

Q. Not listed? A. No.

Q. Or any credits with any banks?

A. Any credits with any banks?

Q. Yes, or any bonds of any kind or securities, stocks? Answer so she can get it. A. No.

Q. None whatever? A. No. [60]

Q. Referring to this engine again, in your realty and title mortgage to Mr. White, I notice that you have listed one Airline pressure gauge together with Enterprise Corporation engine diesel type number 7199. Is that engine still on your place?

A. That's a compressor. I believe it's there.

Q. It's referred to as diesel type, as Enterprise Corporation engine diesel type number 7199. Is it still there? A. Yes, it is still there.

Q. Connected by Watson splicer to the Farrel Birmingham through gear head 240 horse power?

A. That's a mistake. The whole paragraph there is a mistake.

Q. You didn't have any such? A. Yes.

Q. What's the mistake?

A. It isn't described right. That's model—engine model number is DSL, this Enterprise.

(Testimony of T. J. Smith.)

Q. What I am trying to get at, Mr. Smith, is this. You did mortgage an engine to Mr. White. That engine is there?

A. It has a broken trench. That was the reason for buying this engine from Allison.

Q. This diesel engine is not in operation now?

A. No.

Q. You didn't turn in any engine or other pump or equipment on the purchase of your Allison Steel engine? A. No, none whatever.

Q. Did you give to the Allison Steel Company a mortgage back on the engine you bought from them?

A. No. This Enterprise engine there, should be a new crank shaft put in it for insurance on the crop dusting. The same thing wouldn't happen again that happened last year, in 1946, be broken down—was very expensive.

Q. Were your contracting operations profitable?

A. They don't seem to have been very profitable. [61]

Q. You answer that as "no," is that it?

A. No, I don't answer that as "no" because they are not yet determined. Lawsuits are pending. If I am successful, it might be considered profitable. Until the lawsuits are determined, I wouldn't know.

Q. Well, did all of the money you had coming out of the contracting business involve in lawsuits, or did you make substantial sums before those lawsuits? A. I made money, I think.

Q. You lived off that money or did you save it?

A. I used it for development of various things.

(Testimony of T. J. Smith.)

Q. In the contracting business?

A. Not necessarily all in the contracting business.

Q. And for living?

A. Living, developing the farm, the ranch.

Q. The contracting business supported you for several years past or so?

A. No, contracting business hasn't fully supported me.

Q. Well, substantially so?

A. No more than the ranch did.

Q. At least partially so?

A. We made money out of tillage work. Yes, we made money out of farming.

Mr. Bilby: I think that's all. [62]

In the District Court of the United States for the
District of Arizona

No. B-525-Tucson

In the Matter of

T. J. SMITH, Debtor.

Hearing on adjourned meeting of creditors of T. J. Smith, Debtor, held at the Grand Jury Room of the United States District Court, Federal Building, Tucson, Arizona, on Tuesday, the 15th day of April, 1947, at two o'clock in the afternoon before C. R. McFall, Conciliation Commissioner.

The following were present:

John W. Corbin, Attorney for Debtor.

T. J. Smith, Debtor.

(Testimony of T. J. Smith.)

Mr. T. J. Smith, Debtor's Wife.

Ben C. Hill, Attorney representing Wid L. Coffin.

Ashby Lohse, Attorney representing Wid L. Coffin.

Ralph W. Bilby, of counsel for Knapp, Boyle, Bilby & Thompson, Attorneys for L. M. White.

Arthur Henderson, of counsel for Knapp, Boyle, Bilby & Thompson, Attorneys for L. M. White. [64]

Mr. McFall: I should like to ask the debtor one or two questions to clarify my own mind on this question.

Cross-Examination of
T. J. SMITH
Debtor

By Mr. McFall:

Q. Mr. Smith, I believe you testified the other day that you went into the contracting business in 1941 or '42? A. Yes.

Q. Could you give me approximately the date?

A. When I made that statement, I meant on these airports.

Q. When did you start that work?

A. May.

Q. May, 19—— A. 41—42, pardon me.

Q. That's what I thought, '42, and you were devoting all of your time to the contracting business from that time on, weren't you? A. No.

(Testimony of T. J. Smith.)

Q. Did you farm in May '42?

A. I supervised—yes, I farmed.

Q. What about '43? A. Yes.

Q. Well, when did you go out of the contracting business? A. In 1944, in September.

Q. In that interim there, did you have your farm leased out?

A. In 1944 I had it leased out.

Q. That is the only year? A. Yes.

Q. Were you share cropping it before then?

A. No, I had a foreman on the ranch and I supervised it. [65]

Q. You farmed in the year 1945?

A. Yes, sir.

Q. The whole year? A. Yes, sir.

Q. In 1946? A. That's right.

Mr. McFall: It seems to me, gentlemen, that this question, as Mr. Henderson suggests, is one of first impression, and the question is, in my opinion, whether one may incur an indebtedness in another operation to the extent here shown, and then by resuming his farming operations, claim the protection of the statute. I don't think that there is any question but what Mr. Smith is what we call a farmer. That is, I am not passing on that question, but I mean he has always been a farmer for a good many years. It is a legal question entirely as to whether one who engages in other activities and incurs an indebtedness to the extent shown here may, by resuming his farming operations, claim the protection of the Act. By that I simply mean,

(Testimony of T. J. Smith.)

he was a farmer at the time the petition was filed. I don't think there is any question about it, and was a year before that. My purpose is to state the facts as carefully as I can to the court for the purpose of the court to pass on this question if it comes up without any further testimony, and that is my present attitude on that question. That he was a farmer before. That he quit that business substantially for two or three years and then resumed it for two years before the petition was filed, and the debts and assets are all the result of the contracting business with very small exception. Now, if that entitles him to the protection—the court can pass on these facts. I think that would be a rather fair statement of the facts, and if it wants to hear more testimony, it can.

Mr. Corbin: I would like to make one suggestion there. With the exception of the fact that he quit farming for two or three years—he did not quit 'til 1944, whether the indebtedness was during 1941 and '42 and '43, if your Honor please, he did operate a ranch and operated it not on shares, but as a farmer.

Mr. Henderson: Mr. Commissioner, might we ask the debtor a question or two on that particular point?

Mr. McFall: Yes, I would like for you to do that.

Mr. Hill: May I ask a question or two of the petitioner? [66]

Mr. McFall: When Mr. Henderson is finished.

(Testimony of T. J. Smith.)

Mr. Hill: I beg your pardon?

Mr. McFall: As soon as Mr. Henderson is finished.

By Mr. Henderson:

Q. Mr. Smith, you referred to someone you had as a foreman during those years you were doing your contracting work. Who was that?

A. Mr. Hall.

Q. What's his full name?

A. Hall, Irving Hall.

Q. Is he now in the state?

A. I don't know where Mr. Hall is right now.

Q. What was his last address, if you have it?

A. Somewhere in New Mexico. I forgot the name of the place.

Q. What was your arrangement with him specifically? Did you employ him at so much per month or just what was your arrangement?

A. I paid him so much a day—so much a month.

Q. How much was that, do you remember?

A. I think something around \$200.

Mr. Corbin: How much?

Mr. Smith: \$200.

Mr. McFall: A month?

Mr. Smith: A month—50 a week.

Q. Was there anyone else who helped him with the supervision of the work on the farm except you?

A. My wife was there all the time—any question—most of the time I was there night and morning.

(Testimony of T. J. Smith.)

Q. And that was—excuse me.

A. I lived at the ranch all during the time that construction work was going on except the time it took to go back and forth. I was there lots of days, lots of weeks all days, [67] part of the week. I had a foreman. I superintended on the construction job. I was running this engineering.

Q. Then you leased in 1944, as I understand it?

A. I prepared it for him and got it ready to plant and he prepared it after it was ready.

Q. And then in 1945 you returned to the farm and began farming again?

A. In 1944, while I had leased it, I was doing some levelling, did some levelling on the ranch, taking in additional land. Well, he only leased 500 acres on the ranch. I did some additional work on the land, preparing, levelling and clearing.

Q. In 1945 you took over full control?

A. That's right.

Q. Did you have a foreman in 1945?

A. I still have one.

Q. Who was he?

A. His name is Valentine. I didn't pay him a large amount of money. He didn't know as much. But when we have to be away, like today, he looks after the place under my orders.

Q. And he is the only other one who is in charge besides yourself at the present time.

A. My wife has charge when I am not there.
Mr. Henderson: That's all.

Mr. McFall: Mr. Hill?

(Testimony of T. J. Smith.)

By Mr. Hill:

Q. I would like you to state, part of your activities in contracting was in connection with air fields at Douglas, Arizona, is that right?

A. Yes.

Q. And is it through that work over at Douglas that the great percentage of this indebtedness was incurred?

A. No—I can't—no, I can't agree with you on that.

Q. Well, you pulled off of that Douglas job along in February 1943, didn't you? [68]

A. Yes, that's right.

Q. Well, then, did you do any further contracting after that?

A. As I stated the other day, I done some tillage work.

Q. How is that?

A. I done tillage work. I put on a little tillage work until I sold the equipment in 1944, September, 1944.

Q. But is that tillage work—did you take a profit or loss on that tillage work?

A. I took a profit.

Q. You didn't lose any money on tillage. That was in the nature of generally of farming?

A. I beg your pardon?

Q. That was generally in the nature of farming, that tillage, for others? A. That's right.

Q. Well, did you do any other general contracting after you pulled off the Douglas job, what-

(Testimony of T. J. Smith.)

ever it was, after this other man took over, did you do any other general contracting after that?

A. I done some hour work.

Q. Some what?

A. Work by the hour, by the week.

Q. What kind of work?

A. I worked on the railroad; I did some work for the Southern Pacific.

Q. Grading or——

A. No, just bulldoze work by the hour.

Q. Isn't it true that the largest part of the indebtedness listed here today grew out of the exclusive operation on the Douglas airport job?

A. Part of this indebtedness came about through a breakdown of an engine last year, \$10,000, where it had to be a new engine replaced.

Q. That was strictly farming?

A. And part of it, \$26,000, or, as a matter of fact, \$15,000 was federal withholding tax filed upon the ranch.

Q. For what, on the ranch?

A. Withholding tax.

Q. From the ranch?

A. Filed against the ranch, withholding tax on some of these contracts. So it's not all on the contracts. However, the majority was possibly on the contracts.

Q. What I am trying to bring out is that practically the majority of it come out of that one venture over at Douglas?

(Testimony of T. J. Smith.)

A. \$78,000 shows on Pinner, is a judgment—yes, a judgment against me growing out of the Douglas job.

Q. Well, now, before the Douglas job which you entered into in the fall of 1942, had you done any general contracting at that time?

A. I was at that time on contract at Jila Bend, an auxiliary field down there.

Q. Did it involve much money?

A. It involved \$360,000.

Q. Did you take a loss or profit?

A. It's never been settled. None of these contracts have been settled. So I can't say whether it's a loss or profit. It's all in litigation and it's disputed one way or the other. So I can't conceive of the idea yet, unless somebody knows more than I do, whether it's a loss or profit. I know it's embarrassing. I want to know where I am.

Q. Well, then, it can't be said definitely at this time that you have actually made any income out of the contracting business?

A. The best that I can say, it's been very embarrassing on this auxiliary—on this airport. I guess it depends on what you call contracting, what the definition of contracting is.

Q. All right, you go out and take a subcontract on this Douglas airport. Now, if you lost money on the whole on [70] these jobs, would you consider that you had an income from it?

A. As I just said, I am sorry—I just stated that that has not been determined. So, therefore, unless

(Testimony of T. J. Smith.)

you have more information than I do, I don't know whether I lost or made. It's in the courts for decision, whenever they decide it. I won't be able to give you an answer.

Q. So you don't know at this time whether you had any income from this business as a contractor or not, is that right?

A. I had a lot of income, but I understood the question as whether I made money or not.

Q. That's what I mean by income, whether you made any money on it.

A. That, I am unable to tell you until the courts decide the question.

Q. Now, then, as to your farming, have you made any money during this period of time since 1937, as a farmer; have you had any income from that?

A. Yes, sir.

Q. And from any other source, have you had any income? By income I mean profits on it.

A. Farming only. I want to clear it up. After I quit contracting, my income was solely earned from the farm since 1944, September, 1944.

Mr. Hill: If your Honor please, my questions aren't developed with any spirit of antagonism. I am simply trying to get in my own mind the situation as to whether or not he is a farmer, and whether or not his income has been—his only income appears to be materially from farming—whether or not he has had any income from the contracting business, seems to be an uncertain question at this time.

(Testimony of T. J. Smith.)

By Mr. McFall:

Q. (By Mr. McFall): Did you receive income—
I mean any profits from the farm during the years
that you were engaged in the contracting business?

A. Yes.

Q. How many acres did you have in the farm
in 1942 under cultivation? [71]

A. 1942? 500 acres.

Q. In 1943? A. 500 acres.

Q. In 1945? A. 400 acres.

Q. 1946?

A. Pardon me just a minute. 1945? It was 500
acres. 1946 was 400 acres. I made profit, I think,
in 1945 of about \$15,000. [72]

[Endorsed]: Filed June 2, 1947. [73]

[Title of District Court and Cause.]

ORDER DISMISSING DEBTOR'S PETITION

It appearing to the Court that petitioner T. J. Smith, in answer to show cause why petition should not be dismissed, failed to show cause why the petition should not be dismissed on the grounds and for the reason he is not a farmer within the meaning of Section 75 of the Bankruptcy Act,

It Is, Therefore, Hereby Ordered that the petition be and the same is hereby dismissed.

Wednesday, June 4, 1947. [74]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that T. J. Smith, the petitioning debtor above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order made and entered on the 4th day of June, 1947, dismissing debtor's petition, and from the whole thereof.

CORBIN & ORME,
By JOHN W. CORBIN,
Attorneys for T. J. Smith,
Debtor.

[Endorsed]: Filed July 2, 1947. [75]

[Title of District Court and Cause.]

APPEAL BOND AND RECEIPT

Comes now Corbin & Orme and deposits with the Clerk the sum of Two Hundred Fifty Dollars (\$250.00) in cash, lawful money of the United States of America, as a cash bond on appeal.

CORBIN & ORME,
By JOHN W. CORBIN,
Attorney for Debtor.

RECEIPT

This is to certify that the Clerk of the District Court of the United States, District of Arizona, Tucson Division, has received the foregoing sum of Two Hundred Fifty Dollars (\$250.00) in cash as an appeal bond in the foregoing styled and numbered cause.

WM. H. LOVELESS,
Clerk.

By /s/ CATHERINE A. DOUGHERTY,
Chief Deputy.

[Endorsed]: Filed July 28, 1947. [76]

[Title of District Court and Cause.]

DESIGNATION OF PORTION OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN THE RECORD ON AP-
PEAL TO THE CIRCUIT COURT OF
APPEALS

To the Clerk of the above entitled court and to Knapp, Boyle, Bilby and Thompson, attorneys for the creditor, L. M. White, and all other interested parties:

You, and Each of You, are hereby notified that the bankrupt, T. J. Smith, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, desig-

nates the following portion of record, proceedings and evidence to be contained in the record on appeal and to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, by the Clerk of the above district court:

1. Debtor's Petition in Proceedings under Section 75 of the Bankruptcy Act;
2. Notice of First Meeting of Creditors, together with the Summary of Inventory, Statement of Indebtedness and List of Creditors;
3. Notice of Adjourned Meeting of Creditors, dated April 9, 1947;
4. Final Inventory filed on the 15th day of April, 1947;
5. Report and Certificate to the Judge; [77]
6. Order to Show Cause made and entered by the Court on April 22, 1947;
7. Order of Dismissal entered and filed on the 4th day of June, 1947;
8. Notice of Appeal;
9. Bond on Appeal;
10. Reporter's Transcript of testimony taken at the hearing on the order to show cause on the 14th day of May, 1947;
11. This designation.

CORBIN & ORME,
By JOHN W. CORBIN,

Attorneys for T. J. Smith.

[Endorsed]: Filed July 28, 1947. [78]

[Title of District Court and Cause.]

CREDITOR'S DESIGNATION OF PORTION
OF RECORD, PROCEEDINGS AND EVIDENCE
TO BE CONTAINED IN THE
RECORD ON APPEAL TO THE CIRCUIT
COURT OF APPEALS

To the Clerk of the above entitled Court, and to
attorneys for the Debtor and all other inter-
ested parties:

You and Each of you are hereby notified that
the Creditor L. M. White, by and through his attor-
neys, hereby designates the following portion of
record, proceedings and evidence to be contained
in the record on appeal to be transmitted to the
United States Circuit Court of Appeals for the
Ninth Circuit by the Clerk of the above Court,
to wit:

1. Memorandum filed on behalf of L. M. White
by his attorneys on or about June 2, 1947, to-
gether with all transcripts and certified copy
attached thereto.
2. Certified six page report of proceedings of
C. R. McFall, Conciliation Commissioner.

KNAPP, BOYLE, BILBY &
THOMPSON,

ARTHUR HENDERSON,

Attorneys for L. M. White,
Creditor.

Copy of the foregoing mailed to Corbin & Orme,
220 Industrial Building, Phoenix, Arizona, Attor-
neys for Debtor, August 7th, 1947.

[Endorsed]: Filed Aug. 7, 1947. [79]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL AND DOCKET ACTION

It Is Ordered that the time of the debtor herein within which to file the Record on Appeal and docket this action in the United States Circuit Court of Appeals for the Ninth Circuit be and it is extended for a period of twenty days. [80]

Tuesday, August 5, 1947.

In the District Court of the United States for
the District of Arizona

CLERK'S CERTIFICATE
TO TRANSCRIPT OF RECORD

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers, and files of said Court, including the records, papers and files in the matter of T. J. Smith, Debtor, numbered B-525-Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 80, inclusive, contain a full, true and correct transcript of all the proceedings had in said matter and of all the papers filed therein, together with the endorsements on filing thereon, called for and designated in Debtor's Designation, and in Creditors' Designation, of Portion of Record, Proceedings and Evidence to be Contained in the Record on Appeal, filed in said matter and made a part of the transcript attached hereto, as the same

appear from the originals thereof remaining on file in my office as such clerk of the state and district aforesaid.

I further certify that the duplicate of the reporter's transcript filed in said matter is transmitted herewith and made a part of the record on appeal herein.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$11.00 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 19th day of August, 1947.

[Seal] /s/ WM. H. LOVELESS,
Clerk. [81]

In the District Court of the United States for
the District of Arizona

No. B-525

In the Matter of
T. J. SMITH, Debtor.

ORDER TO SHOW CAUSE

The above entitled and numbered cause came on duly and regularly to be heard in the above entitled court, before Hon. Howard C. Speakman, United States District Judge, presiding without a jury, commencing at the hour of 10:00 o'clock, a.m., May 14, 1947, at Tucson, Pima County, Arizona.

The debtor was represented by his attorney, Mr. John Corbin.

Mr. Ben C. Hill represented one of the listed

creditors, one Kaufman & Ashby Laske.

Both sides having announced ready, the following proceedings were had:

The Court: Any other creditors represented here this morning?

(No response.)

The Court: All right. There is an order to show cause here. Let's proceed.

Mr. Corbin: Do I understand we are to offer evidence as to the matter here before the Court?

The Court: This matter arose in a hearing heard [1*] before the Conciliation Commissioner. Some creditor named White, and there arose a question of the jurisdiction of the Court in that he questioned this petitioner being a farmer within the meaning of the Section, and that was reported to the Court, and this order to show cause was issued on that.

Mr. Corbin: At the time the hearing was had, your Honor, I think the Commissioner took evidence that is in no way before the Court. We have to put that evidence on?

The Court: That is right.

Mr. Corbin: We have seen no objection filed by any creditor. If the creditor White raised the question, he did it by—that is verbally, so far as I know, but we are ready to proceed and put the evidence on.

The Court: Very well.

(Thereupon witnesses were called and duly sworn by the Clerk.)

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

T. J. SMITH

was called as a witness in his own behalf, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Corbin:

Q. Will you state your name, please? [2]

A. T. J. Smith.

Q. You are the petitioner here in this matter this morning?

A. I am.

Q. Where do you live, Mr. Smith?

A. Marana, west about five miles, on a ranch.

Q. What is your business or occupation?

A. Farmer.

Q. How long have you been a farmer?

A. All my life.

Q. How long have you lived at Marana?

A. Since 1920, except two years I had a ranch in Phoenix.

Q. What years were those?

A. '36 and '37, part of '37.

Q. What holdings have you?

A. Marana, I have 1280 acres, all farm land.

Q. Do you farm that?

A. Yes, sir.

Q. What part of it is irrigated?

A. There has been about 800 acres irrigated.

Q. How do you irrigate?

A. From a well, Diesel engine driven.

The Court: A little louder, please.

The Witness: A. It is irrigated by a well, Diesel driven pump. [3]

(Testimony of T. J. Smith.)

Q. (By Mr. Corbin): What size engine?

A. There are two engines on the place now, the original one was 165 horse power and last August we broke the crankshaft and I purchased another engine.

Q. There are not two pumping plants?

A. No.

Q. How much water are you pumping there?

A. We pumped at that time 3000 gallons per minute. However, if we had more power we could pump more.

Q. How much will that irrigate?

A. About 500 acres of cotton.

Q. When did you acquire this ranch?

A. I homesteaded this ranch, first in about '32 or '3, one section, and later on I bought a section from the State.

Q. You homesteaded a section of the land and got title from the Government?

A. That is right.

Q. And held it ever since?

A. Yes, sir.

Q. Have you constantly farmed that place yourself?

A. Since I cleared it and leveled it, except one year I rented it to W. H. Lane. [4]

Q. During the last year did you farm that place?

A. Yes, sir.

Q. What did you farm?

A. Cotton and grain, hegari.

(Testimony of T. J. Smith.)

The Court: Pardon me, what year did you rent it?

The Witness: 1944.

Q. (By Mr. Corbin): Mr. Smith, you lived on the place?

A. I lived on the ranch ever since 1936-37.

Q. You are married? A. Yes, sir.

Q. And Mrs. Smith lives with you?

A. Yes, sir.

Q. You have maintained your home at the place all the time?

A. That is right.

Q. Have you in the last—in the past maintained memberships in farm organization?

A. That is right.

Q. In what organization?

A. In the Triple A and Soil Conservation.

Q. And you have received the benefits from those programs as offered by the United States Government?

A. Yes, sir.

Q. Have you maintained Government insurance on [5] the crops that you have raised there?

A. I have.

Q. You have insurance benefits now on that?

A. I have insurance this year, and I am farming it at the present time.

Q. And you have farmed some of it?

A. I have prepared quite a bit, but I have not planted anything yet.

(Testimony of T. J. Smith.)

Q. And the reason you have not planted it is because of your financial difficulties?

A. That is right.

Mr. Corbin: I believe that is all, your Honor.

The Court: Do you care to examine him?

Mr. Hill: No, no questions.

The Court: Mr. Smith, you know the purpose of this hearing? A. Yes, sir.

Q. To determine whether or not you are farmer?

A. Yes, sir.

Q. You understand the proceedings you started apply to farmers only?

A. That is right.

Q. And if you are not a farmer you are not entitled to the benefits of this law under which you are proceeding. You understand that?

A. Yes, sir.

Q. I want to ask a few questions. I noticed listed here in Schedule A-3, for instance, a number of creditors. What is Tregaskes and Godell, \$600, and the note for merchandise, 1946, is that correct?

A. Yes, sir.

Q. What was that merchandise?

A. It was for paint, painting the buildings on the ranch.

Q. Arizona Fertilizer Company, in 1946, \$1633.47?

A. That was for dusting furnished for the cotton.

Q. That went on the ranch?

A. Yes, sir.

(Testimony of T. J. Smith.)

Q. Airplanes for dusting?

A. That is right.

Q. Tucson Realty & Trust Company, three years insurance policy. What is that?

A. On the builings and the contents of it which would be the pump and plant and household furnishings.

Q. That went to the ranch?

A. That is right.

Q. Allison Steel Company.

A. That is the engine I bought last August when the other one broke down. [7]

Q. That is the one you are operating on the ranch at this time? A. That is right.

Q. Shell Chemical Company?

A. That was for fertilizer. We done some experimneting on the cotton last year.

Q. Allen Perry, attorney, \$3796.47.

A. That is attorney's fees.

Q. These attorney's fees? A. Yes, sir.

Q. That was for the trial of a case in Phoenix?

A. That is right.

Q. That case involved some contracting?

A. That is right, sub-contracting.

Q. War contracting? A. That is right.

Q. Dirt movement? A. That is right.

Q. That was in the construction of the Marana Airfield? A. Yes, sir.

Q. Then that was not involved in farming?

A. No, sir.

(Testimony of T. J. Smith.)

Q. The next one, judgment in favor of Warren M. and Louis N. Tenney, that is \$10,000. Did that, was that involved in your farming operations?

A. No, that grew out of those Government contracts.

Q. That was in your contracting business?

A. Yes, sir.

Q. Judgment in favor of the City of Phoenix in the amount of \$2500, with interest. That is in the sum of \$2500. What is that for?

A. That is materials furnished for Smith & Tenney, 50 per cent of that should have been taken care of by Tenney.

Q. Was that contracting or farming?

A. Contracting.

Q. That was secured back in 1943?

A. That is right.

Q. The next item is judgment in favor of Phelps Dodge for merchandise, 1942-1943.

A. That is in the same status.

Q. Contracting? A. That is right.

Q. What was that merchandise?

A. I think that was for tires they got for one of the trucks they had on the job.

Q. Judgment in favor of Arthur Pinner, October, 1946, for the sum of \$78,562.07, plus interest. What was that judgment for?

A. That was on a contract personally, and he was supposed to do certain things on these jobs and out of those amounts would have been approximately that amount. That is the way they figured it.

(Testimony of T. J. Smith.)

Q. That does not involve farming?

A. No.

Q. Now, the claim of Bealey Trucking Company.

A. That is contracting. That is a disputed claim.

Q. Now, the claim of Jennings, Strouss & Trask.

A. That was legal expenses for the Smith-Tenney Construction claim. That is disputed.

Q. That pertains to contracting?

A. Yes, sir.

Q. Does not involve your farming operations?

A. No.

Q. Now, Mr. Smith, in what years were you engaged in contracting?

A. Well, I was in 1943, the latter part of '42, and part of '43. That was, let's see, in August of 1942, until February of 1943, I had a contract and the man ran each contract for me. I was simply financing and furnishing the equipment.

Q. Well, now, this indebtedness occurred as a result of your contracting; as I understand, [10] you have included that in your indebtedness as a farmer.

A. I included it, I don't know how he set it up, Judge. Mr. Burk was handling it. I don't know how he set it up.

Q. Well, go over to Schedule B-3. Here is a judgment in favor of Smith against Arthur Pinner for \$32,002. Is that the result of farming operations or contracting?

A. No, that is the same, contracting.

(Testimony of T. J. Smith.)

Q. The next item is \$12,964 taken by Arthur Pinner, Jr., and applied on the judgment set forth in his favor. What was that, farming or contracting?

A. That was contracting. That was from the Marana job.

Q. The claim of T. J. Smith versus Arthur Pinner and Federal Guarantee Company for \$123,-230.28. Is that the result of farming or contracting?

A. That is contracting. There must be some mistake on that. If that is the total figure, Judge.

Q. Well, the next one, claim of breach of warranty unliquidated to the Arizona Equipment & Sales Company of Phoenix for \$20,000. What is that, farming or contracting? [11]

A. That is farming.

Q. Well, go back to Schedules A and B, statement of debtors. First one is wages, \$215.

A. That is Mike Brady. That is in regard to those contracts.

Q. That is contracts? A. Yes.

Q. Now, taxes?

A. That is on the ranch. Pardon me, I don't know, there may be more.

Q. Taxes due the United States, \$15,909.44.

A. That grew out of those contracts.

Q. Income tax, I presume?

A. That was withholding taxes. Tenney and Pinner were running the job. Tenney was getting a percentage to run the job, and that was that with-

(Testimony of T. J. Smith.)

holding tax we had accumulated there, but he didn't turn it in and pay it to the Government.'

Q. Then the Government has that much of a claim against you as a result of contracting?

A. I think that was settled under Court order, and I think the difference was a penalty of some few hundred dollars, and the judgment was never released on account of the penalty being filed. I think everything but 500 or a thousand dollars.

Q. Next, taxes due districts and municipalities, \$800. [12] A. That was on the ranch.

Q. Going on down, Schedule A, on the same page, I have an item here: Machinery fixtures and tools of \$35,000. What is that?

A. That is equipment on the ranch.

Q. Does that include any road equipment?

A. No.

Q. That is just farm equipment?

A. That is all.

Q. All right, go to Schedule A, first item here is C. M. Brady, Phoenix, 1946, undisputed, \$215.

A. That is the same one we mentioned awhile ago.

Q. Contracting?

A. Yes. That is the same item of labor mentioned a few minutes ago.

Q. What was he, foreman or something?

A. No, he was an engineer man.

Q. I see. Schedule 2 seems to be a mortgage to L. M. White in the sum of \$23,887.

A. That is the mortgage on the ranch.

(Testimony of T. J. Smith.)

Q. That was made when?

A. In 1930. No, I believe it was in 1942 or 1943. I don't remember the exact, exactly when. It is '42 or '43. I believe in 1943, March, 1943.

Q. That was for what; what was the purpose of the correction of that date?

A. I had a mortgage on it already. When I developed the ranch and put in this equipment, I borrowed some money, and the man I had borrowed from was an eastern man, and he was wanting to close out everything in Arizona, and he asked me if I could refinance as he was getting old. A man named Eckert, and I told him I would try to find somebody, and got it from Mr. White.

Q. Anyway, that was not involved in the contracting, it was on the ranch?

A. That is right.

Q. Is there anything listed, Mr. Smith, in any of these schedules covering any machinery or equipment that you used in your contracting business?

A. No. No, sir, none whatever.

The Court: I believe that is all.

Mr. Corbin: May I ask a few questions?

The Court: Go ahead.

Q. (By Mr. Corbin): Mr. Smith, at any time that these contracts were active, were you in charge of them or of the work?

A. I hired the men to take care of all the [14] contracting work.

Q. Were you with them all the time?

(Testimony of T. J. Smith.)

A. No, I was at the ranch. I was about once or twice a week though, whatever time I could get away to check with the foreman on the contracting jobs.

Q. Mr. Smith, during the last year you farmed this place, how much, rather, you had any crops in there last year? A. Yes.

Q. What did you have; what acreage?

A. Approximately 500 acres.

Q. What? A. Approximately 500 acres.

Q. What crop did you have on it?

A. 200 acres of cotton and 300 acres of hegari, grain.

Mr. Corbin: That is all, your Honor.

Q. (By Mr. Hill): Mr. Smith, prior to 1942 did the result of your activities on the farm bring you any profits? A. How is that?

Q. Prior to 1942 did you make any money out of your farm activities? A. Yes.

Q. How much money have you made prior to 1942 [15] out of your farm out at Marana?

A. I couldn't tell you offhand, I would have to look it up, have the bookkeeper look it up.

Q. Was it considerable?

A. Yes, we made money.

Q. You spoke about your contracts, that you did the financing and others did the actual work, where did the money come from you used in financing the contracts?

A. We made arrangements with the First National Bank to finance the contracts.

(Testimony of T. J. Smith.)

Q. Did you use any of the money you earned on the farm on these contracts? A. No.

Q. During the period 1942 and 1943 you were in actual management of your farm?

A. 1942 and '43?

Q. Yes. A. Yes.

Mr. Hill: That is all, your Honor.

The Court: This contracting, Mr. Smith, that was principally leveling and dirt moving?

A. Yes. I would like to make an explanation. I had this equipment in 1942 when the war broke out, and that heavy equipment was really for the farm, and when they started these bases, the [16] Government told me, I believe Joe Trapp, they needed that equipment, and either to go to work or put on the ground to help the Government. I said I would rather not sell it, but if I can arrange where it could work, I would rather do that, and he told me there were two ways to do for helping out the Government, and to do what I could to help; rent it to the Government or some contracting company, or hire a foreman and subcontract with some of the principal contractors and there were several men suggested who would make good foremen, and that is what I did.

The Court: Is that all?

Mr. Corbin: Yes.

Mr. Hill: That is all.

The Court: Very well. That is all. Anything further?

Mr. Corbin: I think we have nothing further, your Honor.

The Court: Well, Mr. Corbin, I haven't figured this out, but it appears just generally here that most of this indebtedness is the result of contracting. Now, can a farmer deviate from his farming and go far afield and create indebtedness and come back and tack it on his farm and take advantage of this Act? [17]

Mr. Corbin: I think there is no question about that, your Honor. I think the cases hold the test of the matter is at the time of the filing of the petition, if the farmer is a farmer at that time he is entitled to the benefits of the Act. I think that the cases hold that the source of the indebtedness makes no difference, and we would like to cite or call to your Honor's attention to those cases. Do you want to hear from me on this?

The Court: I haven't looked it up to any extent in particular. It rather seems to me under this Section it applies only to destitute farmers. It applies only to farmers.

Mr. Corbin: The Statute is that a farmer is one who is engaged in the tilling of the soil, and so forth alone, not where his debts come from.

The Court: All right, and to go on, the principal part of whose income is derived from one or more of the following operations. The majority of his income must be derived from his farm here. Doesn't it follow that the majority of his debts must also come from the farm?

Mr. Corbin: That don't seem to be the theory of the cases.

The Court: Well, I will tell you what I suggest; suppose you file a memorandum or brief, or whatever you want to call it. I am of the opinion without going into it that this indebtedness must result from farming operations and if the amount of the indebtedness set up in these schedules was created as a result of contracting, I doubt if he comes within this Section. I will be frank with you. You may be able to change my mind by submitting proper authorities.

Mr. Corbin: May I say I shared your ideas entirely on that until I looked into some of these cases, and I think we have plenty of law, and I would be glad to submit this brief.

The Court: Very well. Do you gentlemen want to submit anything?

Mr. Hill: No, your Honor.

Mr. Corbin: Within what time?

The Court: What time do you want?

Mr. Corbin: Well, I will ask for a week or ten days.

The Court: I will give you twenty if you want it.

Mr. Corbin: No, I will get it in ten days.

The Court: All right. The matter will be taken under advisement. [19]

I hereby certify that the proceedings had upon the motion to show cause in the within entitled

cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 19 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ W. J. McGUINNESS,
Official Reporter.

[Endorsed]: Filed July 28, 1947.

[Endorsed]: No. 11712. United States Circuit Court of Appeals for the Ninth Circuit. T. J. Smith, Appellant, vs. L. M. White, et al., Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed August 23, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11712

T. J. SMITH,

Appellant,

vs.

L. M. WHITE,

Appellee.

APPELLANT'S STATEMENT OF POINTS
UNDER RULE 19(6) AND DESIGNATION
OF RECORD FOR PRINTING

The following is the point relied upon by the appellant upon the above appeal:

The District Court erred in dismissing the debtor's petition, and in dismissing the proceeding, because, under all of the evidence, and the law thereunto applicable, the debtor is a "farmer" within the meaning and intent of Section 75 of the Act of Congress relating to bankruptcy, as amended, and as such is entitled to relief under said Act.

Appellant hereby designates the entire transcript for printing.

CORBIN & ORME,

By /s/ JOHN W. CORBIN,

Attorneys for Appellant,

220 Industrial Building,

Phoenix, Arizona.

State of Arizona,
County of Maricopa—ss.

On the 2nd day of September, 1947, I transmitted by United States mail, postage prepaid, a true and correct copy of the foregoing document to counsel for appellee, viz. Knapp, Boyle, Bilby & Thompson, Valley Bank Building, Tucson, Arizona.

/s/ JOHN W. CORBIN.

Subscribed and sworn to before me this 2nd day of September, 1947.

[Seal] /s/ LIN ORME, JR.,
Notary Public.

My commission expires Feb. 17, 1950.

[Endorsed]: Filed Sept. 3, 1947.

No. 11712

United States
Circuit Court of Appeals
For the Ninth Circuit

T. J. SMITH,

Appellant,

vs.

L. M. WHITE, et al.,

Appellees.

OPENING BRIEF OF APPELLANT

CORBIN AND ORME
LAWYERS
220 INDUSTRIAL BUILDING
PHOENIX, ARIZONA

Attorneys for Appellant.

FILED

NOV 14 1947

SUBJECT INDEX

	Page
Statement of Jurisdiction.....	1
Statement of the Case.....	2
Argument	4
Specification of Error.....	4
Conclusion	15

TABLE OF CASES

Bankruptcy Act, Sec. 75 (U. S. C. Title 11, Chap. 8, Sec. 203).....	1
Bankruptcy Act, Sec. 24(a) (U. S. C. Title 11, Chap. 4, Sec. 47).....	2
Horner, In re, 104 F. 2d 600.....	12
Jordan vs. Federal Land Bank, 139 F. 2d 203.....	13
Leonard vs. Bennett, 116 F. 2d 128.....	12
Lindsey, In re, 41 F. Supp. 948.....	11
Milligan vs. Federal Land Bank, 129 F. 2d 438.....	12
Moser, In re, 95 F. 2d 944.....	6
Noble vs. Hopewell Natl. Bank, 98 F. 2d 623.....	12
Shyvers vs. Security-First Natl. Bank, 108 F. 2d 611	6
Stoller vs. Cleveland Trust Co., 133 F. 2d 180.....	7

United States
Circuit Court of Appeals
For the Ninth Circuit

T. J. SMITH,

Appellant,

vs.

L. M. WHITE, et al.,

Appellees.

No. 11712

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This is an appeal from an order of the United States District Court for the District of Arizona, dismissing a petition for relief under Section 75 of the Bankruptcy Act (U. S. C. Title 11, Chapter 8, Section 203) "on the grounds and for the reason that he (the appellant) is not a farmer within the meaning of Section 75 of the Bankruptcy Act." (T. R. 77.)

Appellant's petition for relief was filed March 14, 1947 (T. R. 2) and approved by the District Judge March 24, 1947. (T. R. 23.) The order of dismissal was entered June 4, 1947. (T. R. 77.) Notice of

appeal was filed July 2, 1947 (T. R. 78) and cash appeal bond given July 28, 1947. (T. R. 79.)

The jurisdiction of the District Court was invoked under Section 75 of the Bankruptcy Act, above referred to, and jurisdiction of the Circuit Court of Appeals to review the offending order is conferred by subsection (n) of said Section 75 as well as by Section 24 (a) of the Bankruptcy Act (U. S. C. Title 11, Chapter 4, Section 47).

STATEMENT OF THE CASE

But one question is presented by this appeal: Does the evidence establish that the appellant is a farmer within the meaning of Section 75 of the Act of Congress relating to bankruptcy?

The question was first presented by the appellees by objection before the Conciliation Commissioner, (T. R. 40) to whom the matter had been referred. (T. R. 23.) The Conciliation Commissioner, in his report to the District Judge, stated:

“That at the meetings of said creditors the secured creditor, L. M. White, and Tucson Realty and Trust Co., a non-secured creditor, objected to the proceedings upon the ground that the Court was without jurisdiction to proceed under Section 75 of the Bankruptcy Act in this matter, for the reason and upon the ground that the debtor had failed to prove that he was a farmer and entitled to the benefits of said Act.

“As the record now stands, your Conciliation Commissioner is of the opinion that he has no authority or power to determine the jurisdictional question presented and hence makes no findings or conclusions in reference thereto.” (T. R. 40.)

Upon the filing of such report by the Conciliation Commissioner, the District Judge issued an “Order to Show Cause,” the concluding paragraph of which reads:

“It Is Therefore Ordered that T. J. Smith, petitioner herein, appear before this court on the 14th day of May, 1947, at the hour of ten o'clock a. m., to show cause why the objection to the jurisdiction of this court should not be sustained and the case dismissed upon the ground and for the reason that said petitioner is not a farmer within the meaning of Section 75 of the Bankruptcy Act.” (T. R. 42.)

Further evidence was adduced before the District Judge (T. R. 83-99) from which he concluded that appellant was not a farmer within the intent of the Act and dismissed the entire proceeding. (T. R. 77.)

SPECIFICATION OF ERROR

The District Court erred in dismissing the appellant's petition for relief, and in dismissing the proceeding, because under all the evidence and the law thereunto applicable, the appellant is a "farmer" within the meaning and intent of Section 75 of the Act of Congress relating to bankruptcy, and as such is entitled to relief under said Act. (T. R. 100.)

ARGUMENT

Appellant Is a "Farmer" Within the Contemplation of Section 75 of the Bankruptcy Act

The evidence before the Conciliation Commissioner (T. R. 48-77) and before the District Judge (T. R. 85-98), so far as it relates to the question presented by this appeal, may be thus summarized:

Appellant has been a farmer all his life. (T. R. 85.) He owns a farm of 1,280 acres in Pima County, Arizona, one section of which he acquired by homestead entry in 1932 or 1933 and the balance he later acquired. (T. R. 86.) He has lived on such farm, and actively and personally farmed the same, continuously since the year 1938, (T. R. 49) except that during the year 1944 he leased a portion of the farm to a tenant. (T. R. 63, 71, 72, 87.) But even during that year he resided on the farm and did some leveling work upon the unleased portion. (T. R. 72.)

During the war emergency, while many air fields were being constructed in Arizona, he took some contracts, or subcontracts, for the clearing and grading of certain of the air bases. (T. R. 96.)

In 1943 appellant quit the contracting business and disposed of his equipment. (T. R. 50, 73.)

During all the time appellant was engaged in contracting he was also engaged in his farming activities, through almost daily supervision of the work performed by the farm employees. (T. R. 71, 72.) Appellant's principal income for all the years concerned herein has been derived from the farm, (T. R. 76) and it is doubtful if the contracting venture furnished any net income whatever. (T. R. 76.) The greater portion of appellant's financial difficulties grew out of his contracting venture, but not all of his indebtedness arose therefrom—some resulted from farming. (T. R. 88, 89.) Since 1944 appellant's sole source of income has been the farm, (T. R. 76) as he has been exclusively engaged in and personally operating the farm since that time. In fact, up until he filed his petition for relief on March 14, 1947, he was engaged in preparing his land for the 1947 planting and was only prevented from actual planting by the stress of financial difficulties brought about by pressing creditors. (T. R. 87, 88.)

Whether or not such evidence shows the appellant to be a farmer, within the meaning of the Act, must be determined from reading of the statute and the decisions of the courts construing it.

This court, in *In re Moser*, 95 F. 2d 944, employed the following language.

“The first question raised is whether debtors are farmers within the meaning of the act. Section 75(r), as amended, 11 U. S. C. A., par. 203(r) states: ‘For the purposes of this section . . . the term “farmer” includes not only an individual who is primarily *bona fide* personally engaged in producing products of the soil, but also any individual who is primarily *bona fide* personally engaged in dairy farming, the production of poultry or livestock, . . . or the principal part of whose income is derived from any one or more of the foregoing operations.’

“It seems that debtors should be considered farmers both because they (or the husband) personally engage in the farming operations, and because the principal part of the income is derived therefrom. The fact that the ranch house is leased to a tenant is not controlling.” *First Nat. Bank vs. Beach*, 301 U. S. 435, 57 S. Ct. 801, 81 L. Ed. 1206.

In deciding *Shyvers vs. Security First National Bank*, 108 F. 2d 611, the court took occasion to point out that such decision did not overrule its prior holding in the *Moser case*, saying:

“Nor is our decision herein contrary to our holding in *In re Moser*, 9 Cir., 1938, 95 F. 2d 944. In the *Moser case*, as in the *Beach case*, the debtor was held to have personally engaged in farming operations. We simply held that the fact that the

ranch house itself was leased to a tenant did not take the debtor out of the classification of 'farmer.' ”

It is submitted, however, that neither the *Moser case* nor the *Shyvers decision* is precisely in point with the facts of the matter now before the court for review, and that the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Stoller vs. Cleveland Trust Company*, 133 F. 2d 180, is based upon a factual situation more nearly approaching that presented by the record here. In the *Stoller case*, the court said:

“The appellant regularly did a considerable portion of his farm work and personally directed the operations of farms owned or rented by him. He threshed his own crops and those of some of his neighbors and, as an outgrowth of these combined operations, he started a small seed business, the gross volume of which was some two or three thousand dollars for the first year. In the course of sixteen years, his seed business reached a peak of over \$350,000 in gross volume. The seed business exacted increasing demands upon his time, until he devoted somewhat more than half of his working hours to its care. During the rush season, the major portion of his time was devoted to this seed business, and during the slack season his farming operations were paramount in time consumption. At no time did he abandon active duties on his farm. He saw to the upkeep of improvements and the maintenance of the fertility

of the soil which he farmed and, as the master put it, ‘followed all the practices of good husbandry.’

. . . .

“The Act of Congress invoked by appellant must be liberally construed to give the debtor the full measure of relief afforded by Congress, ‘lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.’ *Wright vs. Union Central Life Insurance Co.*, 311 U. S. 273, 279, 61 S. Ct. 196, 200, 85 L. Ed. 184. See, also, *John Hancock Mutual Life Insurance Co. vs. Bartels*, 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. 176; *Kalb vs. Feuerstein*, 308 U. S. 433, 60 S. Ct. 343, 84 L. Ed. 370; *Chapman vs. Federal Land Bank of Louisville, Ky.*, 6 Cir., 117 F. 2d 321, 325.

“The Supreme Court, in *First National Bank vs. Beach*, 301 U. S. 435, 438, 439, 57 S. Ct. 801, 803, 81 L. Ed. 1206, has declared that, in determining in every case of this character whether the petitioner is a farmer because ‘personally *bona fide* engaged primarily in farming operations’ or because ‘the principal part of his income was derived from farming operations,’ the totality of the facts must be considered and appraised. The Supreme Court would not attempt to fix the meaning of either of the two branches of the definition considered in the abstract, saying that the two are not equivalents but are used by way of contract. The words ‘primarily engaged’ in the first branch of the definition, and the words ‘income derived

from farming operations' in the second, were said not to constitute terms of art. Mr. Justice Cardozo wrote: 'A farmer remains a farmer, just as a lawyer remains a lawyer, though the returns of his investments, while not enough to keep him going, are larger, none the less, than the profits of his labor. . . . We emphasize the fact afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a content that may vary with the setting. (Citing cases.) In the setting of this enterprise, the totality of its circumstances, the roots of the respondent's income go down into the soil.'

"So, in the setting of the case here for decision and the totality of its circumstances, the roots of appellant's income would seem to go down into the soil. He is, therefore, entitled in full measure to the relief provided by the Act of Congress of May 15, 1935, c. 114, Sec. 3, 49 Stat. 246, 11 U. S. C. A., par. 203, sub. r."

In the *Stoller case*, the debtor was actually engaged in farming at the time of his filing his petition for relief. Likewise, was the appellant here. In the *Stoller case* the debtor was engaged in an outside activity, namely the seed business, up to the time of filing his petition. In this appeal the debtor (appellant) was not and had not since 1943 been engaged in any activity except farming. In the *Stoller case*, Mr. Stoller had been for a number of years a *bona fide* farmer. He extended his activities to include another business

which quickly grew to large proportions and tumbled into a maze of debt. The same experience befell the debtor appellant herein. Mr. Smith, in an effort to do his part of the war effort, ventured out upon a contracting venture which proved to be most unfortunate so far as financial considerations are concerned. The lower court in the *Stoller case* held that Stoller's principal income prior to his filing his petition for relief had been derived from the seed business, and that the substantial portion of his indebtedness arose out of the seed business and that, therefore, Stoller could not qualify as a farmer within the meaning of Section 75 of the Bankruptcy Act. On appeal, the Circuit Court of Appeals reversed the decision of the trial court, holding that the debtor was a farmer within the meaning of said Section 75 and was therefore entitled to the relief offered to such debtors under the act. The court held that, however varied his activities, it was apparent from the record that the industrious appellant applied a most substantial portion of his time to the work of a "dirt farmer"; that the appellant's income from the seed business and farm were not segregated; that his financial difficulties arose out of the seed business; that his farming operations were profitable; that he made money from his farm, and the fact that the preponderance of his debts were weighed upon him from the seed business was corroborative of his assertion that the principal part of his income was derived from farming.

Appellees, in their memorandum to the trial court (T. R. 42, 44), made great moment of the fact that the seed business and farming could be related businesses, pointing out this idea as a reason for the courts being led to decide that Stoller was a farmer. In reading the opinion of the court in that case, the appellant is unable to find anywhere in it any indication that the court considered the two activities of Stoller—namely, farming and his seed business, as anything but separate and distinct enterprises. The controlling factors in the case, which resulted in the decision, were the fact that Stoller was actually a “dirt farmer” personally engaged in farming activity at the time he filed his petition, plus the fact that the principal portion of the Stoller income (profits) was derived from his farming activities. The nature of the debtor’s indebtedness and the fact that it arose out of the seed business had no bearing whatever. The debtor was a *bona fide* farmer and that was all that was necessary.

Appellant is unable to conceive a situation more directly in point with the facts of his case than that present and controlling in the *Stoller case*. The nature of the indebtedness in the *Stoller case* did not overshadow, there, the appellant’s status as a farmer.

In *In Re Linsey*, 41 F. Supp. 948, the court held that one who is primarily personally and in good faith engaged in farming need not spend all of his time therein or refrain from engaging in secondary activities in order to be a “farmer” within Section 75 of the Bankruptcy Act.

In *In Re Horner*, (C. C. A. 7) 104 F. 2d 600, it is held that Horner was a farmer within the meaning of Section 75 of the Bankruptcy Act because he was engaged in producing products of the soil and deriving the principal part of his income therefrom, even though he did obtain other income from other activities. The court said the proper test under the language of the act must be “was the petitioner either primarily *bona fide* personally engaged in producing products of the soil, or was the principal part of his income derived from his activities in producing products of the soil.”

The attention of the court is also respectfully invited to *Leonard vs. Bennett*, 116 F. 2d 128, and *Noble vs. Hopewell National Bank*, 98 F. 2d 623.

Of course, the debtor's status as a farmer is to be determined as of the time of the filing of his petition for relief and not at any time prior thereto. As authority for this contention, appellant submits the following language from *Milligan vs. Federal Land Bank of Omaha*, (C. C. A. 8) 129 F. 2d 438:

“We find nothing in that contention and showing which makes her a farmer within the meaning of the term as defined by Congress. That definition (Subsection r), covers the full scope of Congressional liberality and indulgence. The record in this case, viewed in the light most favorable to the debtor, contains nothing which would justify an inference that the debtor, *at the time she filed her petition*, was ‘*bona fide* primarily and per-

sonally engaged' in farming operations or the production of agricultural products or that she derived any income whatever from the operation of the farm which she owned and leased."

Again, in deciding *Jordan vs. Federal Land Bank*, (C. C. A. 8) 139 F. 2d 203, 204, the court said:

"The important question presented by this appeal is whether the determination by the Supervising Conciliation Commissioner and by the District Court that the debtor (appellant), *at the time he filed his petition* under Section 75 of the Bankruptcy Act, 11 U. S. C. A. 203, was not a farmer within the definition of Section 75, sub. r of the Act, 11 U. S. C. A. 203 sub. r, is erroneous."

In the *Jordan case* the debtor had ceased to live on his farm or to work thereon and had for some time lived in town. He spent the rentals, and did not attempt to pay the taxes, or make any repairs upon the farm, or to reduce the mortgage indebtedness thereon. There was no evidence that he ever intended to return to the farm. Therefore, in holding that the debtor was not a farmer within the meaning of the Act at the time of filing his petition, the court said, 139 F. 2d 203, 206:

"We need not decide whether the debtor could have qualified as a 'farmer' had the District Court adopted the view that his leasing of the ranch was a mere temporary expedient to enable him to meet pressing financial needs, and that it was his *bona fide* intention to resume operating the ranch himself as soon as possible. The Supervising Con-

ciliation Commissioner and the District Court both rejected that view of the evidence.”

In the light of the language of the court in the two cases just cited, we submit that the proper time at which facts pertaining to the question whether T. J. Smith was a farmer or not are to be drawn from the time of his filing a petition for relief.

Appellant concedes that the evidence establishes that the larger portion of his indebtedness arose out of an unfortunate venture into the contracting business, and that while his farming activities made a profit, his contracting venture resulted in unfortunate and heavy losses. However, the nature of the principal portion of his indebtedness does not control his status as a farmer for, as above demonstrated, never once during the entire period here involved did appellant cease to be actively and personally engaged in the operation of his farm; never once did he cease to live thereon and never was his principal source of income derived from anything other than farming.

CONCLUSION

It is most respectfully insisted that all of the evidence in the case demonstrates conclusively and without contradiction that appellant was a farmer within the contemplation of the act, and that the order dismissing his petition for relief was erroneously entered and should be reversed.

Respectfully submitted,

JOHN W. CORBIN,

LIN ORME, JR.,

J. S. RIGGS,

ALLAN K. PERRY,

Attorneys for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit

FREDERICK JOHN WOLFE,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

No. 11713

United States
Circuit Court of Appeals
For the Ninth Circuit

FREDERICK JOHN WOLFE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	12
Appearances	1
Certificate of Clerk of Tax Court.....	107
Decision	40
Docket Entries.....	2
Findings of Fact and Opinion.....	14
Findings of Fact.....	16
Opinion	26
Notice of Filing Petition for Review.....	45
Petition	4
Exhibit A—Letter to F. J. Wolfe, 12/11/44	9
Statement	10
Petition for Review and Proof of Service.....	41
Petitioner's Designation of Record.....	105
Petitioner's Statement of Points.....	46

INDEX	PAGE
Statement of Evidence.....	58
Witness, Petitioner:	
Wolfe, Frederick J.	
—direct	59
—cross	72
—redirect	77
Witness, Respondent:	
Rackley, Kenneth N.	
—direct	77
—cross	86
—redirect	101
Koch, George S.	
—direct	101
—cross	104

APPEARANCES

For Taxpayer :

WILLIAM GALBALLY, JR., ESQ.

JAMES H. HAYES, ESQ.

JAMES O. WYNN, ESQ.

HENRY B. BURR, ESQ.

For Commissioner :

SHELDON ECKMAN, ESQ.

The Tax Court of the United States
Docket No. 7287

FREDERICK JOHN WOLFE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1945

- Mar. 5 Petition received and filed. Taxpayer notified. Fee paid.
- Mar. 5 Request for Circuit hearing in Los Angeles, Calif., filed by taxpayer. 3/15/45, granted.
- Mar. 6 Copy of petition served on General Counsel.
- Apr. 17 Answer filed by General Counsel.
- Apr. 18 Copy of answer served on taxpayer—Los Angeles, Calif.
- Nov. 1 Notice of appearance of James O. Wynne as counsel filed.
- Nov. 1 Motion to change place of hearing from Los Angeles to New York City filed by taxpayer. 11/2/45 granted.

1946

- Aug. 6 Hearing set Oct. 7, 1946, at New York City.

1946

- Oct. 7 Hearing had before Judge Disney on the merits. Partial stipulation of facts filed. Appearances of James H. Hayes, Esq., and Henry B. Burr, Esq., as counsel filed. Petitioner's brief due 11/7/46—respondent's 12/1/46—petitioner's reply 12/15/46.
- Oct. 29 Transcript of hearing of 10/7/46 filed.
- Nov. 7 Brief filed by taxpayer. Copy served.
- Nov. 27 Brief filed by General Counsel.
- Dec. 13 Motion for extension to December 23, 1946, to file reply brief, filed by taxpayer. 12/13/46 granted.
- Dec. 30 Motion for leave to file the attached printed reply brief filed by taxpayer. 12/31/46 granted.
- Dec. 31 Reply brief filed by taxpayer. 1/2/47 copy served.

1947

- Mar. 31 Findings of fact and opinion rendered, Disney J. Decision will be entered for the respondent. 4/1/47 copy served.
- Apr. 1 Decision entered, Disney J., Div. 4.
- June 25 Bond in the amount of \$3,000.00 approved and ordered filed.
- June 25 Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, filed by taxpayer.
- June 25 Proof of service filed by taxpayer. [1*]
- July 31 Statement of points filed by taxpayer with proof of service thereon.

1947

- July 31 Designation of portions of record filed by taxpayer with proof of service thereon.
- Aug. 11 Statement of evidence filed.
- Aug. 11 Certified copy of order from 9th Circuit extending time for filing and docketing the appeal to September 15, 1947, filed. [2]
-

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:PAK) dated December 11, 1944, and as a basis of this proceeding alleges as follows:

1. Petitioner is an individual residing at 1155 Oak Grove Avenue, San Marino, California. His income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached hereto, marked "Exhibit A" and made a part hereof) was mailed to the petitioner on December 11, 1944.

3. The tax in controversy is income tax for the calendar year 1941 in the amount of \$1,101.49.

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

(a) The respondent erred in adding to petitioner's net taxable income for the year 1941 the sum of \$5,780.67. [3]

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner is a resident of the County of Los Angeles, State of California, and as such filed his income tax return for the year here involved with the Collector of Internal Revenue for the Six Collector District of California.

(b) The petitioner, an individual, is a Canadian citizen and became a resident of the United States on or about October 4, 1941. He entered this country under the authority of an immigration visa intending to become a resident. Prior to coming to the United States and during the period 1931 to 1941, petitioner was a resident of the United Kingdom, living at London, England.

(c) During 1931 the petitioner became Chairman and Managing Director of the Anglo-American Oil Company, Limited, an English company. During 1931 it was agreed by and between petitioner and his employer, Anglo-American Oil Company, Limited, that upon his retirement from the company's employment he would be given an annuity computed in accordance with the provisions of the company's superannuation plan in effect at the date of petitioner's retirement; it being understood by and between petitioner and his employer that he was not eligible to participate in the superannuation plan of Anglo-American Oil Company, Limited, as

such plan was not applicable to any person who entered the employ of the Anglo-American Oil Company, Limited, subsequent to May 18, 1928.

(d) On March 22, 1940, the Anglo-American Oil Company, Limited, the Standard Oil Company of New Jersey and petitioner entered into an agreement whereunder in recognition of taxpayer's valuable services to it, Anglo-American Oil Company, Limited, agreed to pay to Standard Oil Company of New Jersey the capital sum of eighty-nine [4] thousand one hundred and twenty pounds sterling (£89,120-0-0), or the equivalent in United States currency of four hundred and fifteen thousand, seven hundred and eighty-six 75/100 dollars (\$415,786.75) and Standard Oil Company of New Jersey agreed to pay petitioner a life annuity of three thousand and thirty-eight and 75/100 dollars (\$3,038.75) per month and to pay the same annuity to petitioner's wife, Marguerite B. Wolfe, for one year should she survive petitioner.

Said contract between the petitioner, said Anglo-American Oil Company, Limited, and said Standard Oil Company of New Jersey was an agreement to make periodical payments to the petitioner and, after the death of the petitioner, to his wife. The making and continuance of all of the series of such payments was dependent upon the continuance of human life, to wit, the life of the petitioner, and after the petitioner's death, the life of his wife. Such agreement was not insurance upon the life or lives of a human being or of human beings and was not insurance appertaining thereto. Said agreement was an annuity contract.

(e) Pursuant to said contract of March 22, 1940, Anglo-American Oil Company, Limited, paid to Standard Oil Company of New Jersey the capital sum of eighty-nine thousand one hundred and twenty pounds sterling (£89,120-0-0) for petitioner's annuity. Said amount was the aggregate premium and consideration paid for said annuity.

(f) Petitioner retired from his employment with Anglo-American Oil Company, Limited, on or about July 1, 1940.

(g) Standard Oil Company of New Jersey has regularly paid to petitioner or his order each month from the date of his retirement to the present time, pursuant to the contract of March 22, 1940, the sum of three thousand [5] and thirty-eight and 75/100 dollars (\$3,038.75). The amount so received by the petitioner intermediate October 4, 1941, and December 31, 1941, was five thousand seven hundred eighty dollars sixty-seven cents (\$5,780.67).

(h) Prior to October 4, 1941, petitioner was a non-resident alien and as such no part of the amounts received by him prior to October 4, 1941, were included in his gross income for the purposes of determining net taxable income.

(i) There has been no transfer of the agreement described in paragraph 5 (d) herein.

(j) The deficiency from the determination of which this appeal is taken, is based upon a computation of the petitioner's taxable net income for the calendar year 1941 in which computation no part of the said annuity has been excluded from the petitioner's gross income.

Wherefore, petitioner prays that the Tax Court of the United States may hear this petition and determine that the respondent erred as alleged in paragraph 4 hereof and redetermine the aforesaid deficiency in accordance with the rights of petitioner in the premises and grant any and all refunds that may be due as a result of such redetermination.

Dated this 3rd day of March, 1945.

/s/ WILLIAM GALBALLY, JR.,
Counsel for Petitioner.

Of Counsel:

JAMES O. WYNN. [6]

State of California,
County of Los Angeles—ss.

Frederick John Wolfe, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition or had the same read to him and is familiar with the statements contained therein and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

/s/ FREDERICK JOHN WOLFE.

Subscribed and sworn to before me this 3rd day of March, 1945.

/s/ FLORENCE E. SCALLON,
Notary Public.

My Commission Expires Feb. 27, 1946. [7]

EXHIBIT A

[Letterhead Treasury Department]

December 11, 1944.

Office of Internal Revenue Agent in Charge Los
Angeles Division, LA:IT:90D:PAK.

Mr. Frederick John Wolfe
1155 Oak Grove Avenue
San Marino, California

Dear Mr. Wolfe:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1941, discloses a deficiency of \$1,101.49, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the

closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent in
Charge.

PAK:vmc

Enclosures:

Statement

Form of waiver [8]

STATEMENT

Tax Liability for the Taxable Year
Ended December 31, 1941

	Liability	Assessed	Deficiency
Income Tax.....	\$1,431.56	\$330.07	\$1,101.49

In making this determination of your income tax liability careful consideration has been given to the report of examination dated January 5, 1944, to your protest dated March 31, 1944 and to the statements made at conferences held on April 24 and October 24, 1944.

A copy of this letter and statement has been mailed to your representative, Mr. William Galbally, Jr., 510 South Spring Street, Los Angeles 13, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustment to Net Income

Net income as disclosed by return.....	\$3,589.14
Additional income:	
(a) Income excluded from return.....	5,780.67
Net income adjusted.....	<u>\$9,369.81</u>

Explanation of Adjustment

(a) It is determined that the entire amount received by you from the Standard Oil Company of New Jersey during your residence in the United States constitutes gross income under the provisions of section 22, of the Internal Revenue Code. Accordingly, income from that source has been increased from \$3,041.51 reported by you to \$8,822.18.

Due to the increase in taxable income as shown herein the credit for income taxes paid to the Dominion of Canada has been increased from \$64.52 claimed in your return to \$95.60 the amount allowable under section 131(b) of the Internal Revenue Code.

Computation of Tax

Net Income Adjusted.....	\$9,369.81
Less: Personal exemption claimed by wife.....	
Balance (surtax net income).....	\$9,369.81
Less: Earned income credit (10% of \$8,882.18).....	882.22
Net income subject to normal tax.....	\$8,487.59
Normal tax at 4% on \$8,487.59.....	\$ 339.50
Surtax on 9,369.81.....	1,187.66
Total normal tax and surtax.....	\$1,527.16
Total income tax.....	1,527.16
Less: Income tax paid to a foreign country.....	95.60
Correct income tax liability.....	\$1,431.56
Income tax assessed:	
Original, account No. 951809.....	330.07
Deficiency of income tax.....	\$1,101.49

[Endorsed]: Received and filed March 5, 1945.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is income tax for the calendar year 1941; denies the remaining allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraph (a) of paragraph 4 of the petition.

5. Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

(c) Admits that during 1931 the petitioner became chairman and managing director of the Anglo-American Oil Company, Limited, an English company; denies the remaining allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d) and (e) Denies the Allegations contained in subparagraphs (d) and (e) of paragraph 5 of the petition.

(f) Denies for lack of information upon the basis of which to form a belief as to the truth or correctness thereof, the allegations contained in subparagraph (f) of paragraph 5 of the petition.

(g) Admits only, and no more of subparagraph (g) of paragraph 5 of the petition, than that the petitioner during the year 1941 received from the Standard Oil Company of New Jersey regularly each month the sum of \$3,038.75.

(h) Admits that prior to October 4, 1941, petitioner was a non-resident alien; denies the remaining allegations contained in subparagraph (h) of paragraph 5 of the petition.

(i) Denies for lack of information upon the basis of which to form a belief as to the truth or correctness thereof, the allegations contained in subparagraph (i) of paragraph 5 of the petition.

(j) Admits the allegations contained in subparagraph (j) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied. [12]

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,

ECC

Chief Counsel, Bureau of Internal
Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel.

E. C. CROUTER,

B. M. COON,

Special Attorneys, Bureau of
Internal Revenue.

BMC:ec 4/9/45.

[Endorsed]: Received and filed April 17, 1945.

The Tax Court of the United States
FREDERICK JOHN WOLFE,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 7287. Promulgated March 31, 1947.

The petitioner was for 28 years employed by subsidiaries of Standard Oil Co. of New Jersey, includ-

ing Anglo, and for 10 years prior thereto by a company absorbed by a subsidiary of Standard. Anglo in 1940 paid Standard about \$415,000 and Standard agreed in writing to pay, and thereafter, including the taxable year 1941 did pay the petitioner upon retirement \$36,465 per year, based upon 38 years' service. Correspondence and the contract referred to the \$415,000 as a contribution by Anglo. The payments were referred to variously as "annuity" or "pension." The petitioner in 1940 was a nonresident alien, being a Canadian residing in England. In 1941 he was a resident of the United States. Held, the payment to petitioner in 1941 was not an annuity, within section 22 (b) (2) of the Internal Revenue Code, and the \$415,000 was not taxable to him in 1940, and the payment in 1941 was all taxable income under section 22 (a) of the Internal Revenue Code.

James O. Wynn, Esq., William Galbally, Jr., Esq., James H. Hayes, Esq., and Henry B. Burr, Esq., for the petitioner.

Sheldon V. Ekmann, Esq., for the respondent.

This case involves income tax for the year 1941. Deficiency was determined in the amount of \$1,-101.49, all of which is contested. The only issue presented is whether the monthly payments received by petitioner from the Standard Oil Co. (New Jersey) are taxable to him in full as ordinary income or whether they are taxable as an annuity under section 22 (b) (2) of the Internal Revenue Code.

A stipulation of facts was filed. We adopt same by reference and find the facts therein set forth. Such parts thereof as it is considered necessary to set forth are included with other facts found from evidence adduced in our findings of fact.

Findings of Fact

Petitioner is an individual and filed an income tax return for the year 1941 with the collector of Internal revenue for the sixth district of California. Petitioner is a citizen of Canada. From his birth in [14] 1879 to 1931 he was a resident of Canada, and from 1931 to October 4, 1941, prior to coming to the United States, he was a resident of England.

In 1902 petitioner entered the employ of the Queen City Oil Co., Ltd., a Canadian corporation, which company in 1911 or 1912 was absorbed by the Imperial Oil Co., Ltd. (hereinafter referred to as Imperial), a Canadian corporation. Petitioner continued in the employ of Imperial until March 1, 1931. The stock of Imperial was largely held by the Standard Oil Co. of New Jersey (hereinafter referred to as Standard).

Two or three months prior to March 1, 1931, petitioner was requested by the senior vice president of Imperial to go to England and take over the duties of the managing director of the Anglo-American Oil Co., Ltd. (hereinafter referred to as Anglo), an English corporation. On March 1, 1931, petitioner became managing director, and later in 1931, chairman, of the board of Anglo. Anglo was stock con-

trolled by the Standard Oil Export Corporation, which, in turn, was stock controlled by Standard.

Prior to March 1, 1931, petitioner had conversations with officers of both Standard and Standard Oil Export Corporation to obtain knowledge of the background of Anglo. The amount of salary that he was to receive from Anglo was discussed between petitioner and the senior vice president of Imperial. It was the understanding when the petitioner undertook the assignment of chairman and managing director of Anglo, at the request of Standard, that if he was eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo in effect on the date of retirement and that payment of such pension in sterling would be guaranteed by Standard in dollars at an exchange rate of \$5 to the pound. Before petitioner went to England he knew that Anglo had a scheme or plan in existence for paying its retired employees. Petitioner did not know much about the actual details at that time, but he knew that the basis of the plan was as follows: An employee was entitled on retirement to roughly 2 per cent per year of service, based on a maximum of 75 per cent, and the average of the last 5 years' pay. Retirement at 60 for one who had the full 37½ years of service would be about 66.3 per cent.

After petitioner went to England, and prior to October 22, 1931, he discussed with the executives of Anglo the question of payments to be made to him in the event of his retirement from the services of that company. Petitioner told them very "plainly"

that he wanted to be considered on the same basis as those who were under the superannuation plan. On August 20, 1931, J. W. Myers, then secretary of [15] Standard's committee on annuities and benefits, wrote D. L. Harper, in charge of foreign sales for Standard, as follows:

Mr. D. L. Harper,
Building.

Dear Mr. Harper:

In reply to your letter of August 14th, regarding Mr. F. J. Wolfe's service record, this will confirm our conference with Mr. Wolfe the other day to the effect that this question is to be deferred until the Anglo American Oil Company has revised its Annuity Plan. This decision is based on the probability that any such Plan will fully take care of Mr. Wolfe's case. Of course, if it does not, the matter will have to be given special consideration at the proper time.

Very truly yours,
/s/ J. W. MYERS,
Secretary.

JWM:G

(Notation) 11/29/33

Anglo is to adopt service credit rules basically the same as those of S. O. Co. (N. J.), with such additions as will care for employees of their own subs. Follow this point when plan is in final shape.

After some discussion, it was decided that petitioner was to be treated as if he had been in the employ of Anglo from the date in June, 1902, when he was first employed by the Queen City Oil Co., Ltd. This board of directors of Anglo passed a resolution to that effect on October 22, 1931, which reads as follows:

Resolved, it being part of the arrangement with Mr. Wolfe on his joining the Board of this Company, and becoming Managing Director, that for the purpose of calculating pension payable by this Company to him, his services shall be deemed to commence from June, 1902, on which date he joined the Queen City Oil Co., Ltd., (which was subsequently absorbed by the Imperial Co., Ltd., of Canada) and that he be entitled to pension on the same basis as employees benefiting under the Company's Superannuation Scheme dated 31st December, 1925, or any subsequent modification thereof.

In 1939 petitioner informed Anglo that he wished to retire and live in the United States and that he wished his "annuity" to be paid in United States dollars at \$5 to the pound. Discussions were had with officials of Anglo and of Standard to this end. Various procedures for paying petitioner were discussed by Standard, Anglo, and petitioner. Among them was a proposal to purchase an annuity for petitioner from a commercial insurance company. This proposal was never accepted or put into effect.

Under date of June 21, 1939, one of the staff on Standard's committee on annuities and benefits furnished to F. W. Pierce, executive assistant to the president of Standard, a memorandum, in pertinent part, expressing doubt whether a purchase of such a large amount could be made from an insurance company, and that Equitable had indicated that they would, if asked to write such a contract, have to think it over; also enclosing a table showing "approximate capital [16] value of Mr. Wolfe's annuity," assuming retirement at July 1, 1940, to have a "total cost" of \$467,165, for an annuity of \$34,131 (based on exchanges at \$4.68 on June 20, 1939).

Under date of June 29, 1939, F. W. Pierce wrote T. C. McCobb, a member of the board of directors of Standard, on the subject "Retirement of F. J. Wolfe," stating, in part, as follows:

We understand that under the agreement with Mr. Wolfe, he is to receive, upon retirement, a life annuity calculated in accordance with the Anglo Plan and their discount absorption program (the latter being identical to ours), the annuity to be payable in the United States in dollars converted at the rate of \$5.00 to the pound. * * *

The procedure which is to be followed in respect of payment and transfer of funds has been discussed with Mr. Wolfe and we find that it presents some problems. However, subject to proper approval, it is proposed that the annuity be paid by New York in dollars, converted at the

rate of \$5.00 to the pound. In view of the uncertainties of the future and in order to assure that the necessary funds be available here when needed, it is further proposed that Anglo transfer to S. O. Co. of N. J. for deposit to the sub-account for assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability, assuming retirement as of January 1, 1940, computed on a 3% interest basis and discounted for mortality but not for labor turnover due to any other cause. This transfer would be dollars at the rate of exchange prevailing at the time of payment. If retirement occurs at a later date, Anglo would make the necessary additional capital contribution. In the event of Mr. Wolfe's death prior to retirement, the capital contribution plus 3% interest, compounded annually, would be returned to Anglo unless the pension had meanwhile been insured in which event, the premium refund, if any, would be determined in accordance with the provisions of the insurance contract under which it was purchased. Any cost incurred in New York by reason of a sterling rate less than \$5.00 would be absorbed by Jersey and charged to such account as may be later determined. The Anglo sterling pension capital contribution would possibly not be a deductible item for income tax purposes so far as concerns Anglo.

A table set forth in the letter showed the "annual annuity" assumed effective July 1, 1940, to be \$36,465 (dollars at \$5 per pound) and \$34,131 (dollars at \$4.68).

Under date of August 4, 1939, R. A. Carder, an official and secretary of Anglo, in charge of finances, wrote Frank Pierce, "Annuities & Benefits Dept.," a letter, stating in part, as follows:

* * * the procedure [retirement of F. J. Wolfe] proposed entails obligations on all three parties affected and is of considerable importance, it seems to us that by far the best method of dealing with the matter is to embody the arrangement in a simple three-party agreement.

Pencil notations appear at the bottom of the letter as follows:

£87,177 at 4.68—408,988; at 5.00—435,885.
Group Annuity * * *, our estimated cost at 3%—491,000. Without loading 451,000.

A letter from an official of Standard to R. A. Carder, an official of Anglo, under date of January 9, 1940, indicated that final arrangements had been made, satisfactory to petitioner, so that his retirement would [17] become effective July 1, 1940. The letter contained, in part, the following:

Final arrangements have been made, satisfactory to Mr. Wolfe, so that his retirement will become effective July 1, 1940. Although our formal setup for taking care of the annuity is not completed, we have undertaken to guarantee Mr.

Wolfe that the money which you have provided, plus the additional amounts which Standard Oil Co. of New Jersey will be required to put up, will be used to assure him the annuity to which he is entitled, and there is no reason, therefore, why you should not formally record the transaction.

It was ultimately decided to handle the matter by having Anglo transfer to Standard the present value of Anglo's pension liability to petitioner and having Standard pay petitioner monthly in dollars. During the time petitioner was employed by Anglo his salary was £11,000 per year, and the salary did not vary in the last five years of his service.

On March 22, 1940, T. W. Pierce wrote R. A. Carder, enclosing three copies of "an agreement of annuity." Reference was made to "Anglo's initial contribution." The agreement under date of March 22, 1940, referred to in the letter of March 22, 1940, and drawn by an official of Standard, entered into between Anglo, Standard and petitioner, reads in pertinent part as follows:

Whereas, Mr. Wolfe is Chairman and Managing Director of the Anglo Company and on March 1, 1931, undertook this assignment at the request of the Standard Company on the understanding that if he were eventually retired from the service of the Anglo Company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo Company as in effect on the date of retirement and

that payment of such sterling pension would be guaranteed by the Standard Company in dollars at an exchange rate of five dollars to the pound.

And Whereas, Mr. Wolfe is to be retired from the service of the Anglo Company on the first day of July, 1940.

And Whereas, the Anglo Company is unable to grant formally an annuity to Mr. Wolfe under its own superannuation scheme or pay same from its superannuation fund for the reason that such scheme and related fund are not applicable to any person who entered the employ of the Anglo Company subsequent to May 18, 1928.

And Whereas, the Anglo Company desires to recognize Mr. Wolfe's valuable services to the Anglo Company by contributing to the Standard Company a capital sum of £89,120-0-0 representing the liability which it would have incurred had it granted Mr. Wolfe a sterling pension equivalent to that payable under the superannuation scheme of the Anglo Company.

And Whereas, the Standard Company has agreed to accept the aforesaid £89,120-0-0 from the Anglo Company and to pay Mr. Wolfe a life annuity as hereinafter provided.

Now It Is Hereby Witnessed as follows:

1. That in consideration of the aforesaid understanding with Mr. Wolfe the Standard Company hereby covenants to pay Mr. Wolfe a life annuity of \$3,038.75 per month, effective July 1, 1940, with the understanding that should Mr.

Wolfe's present wife, Marguerite W. Wolfe, survive him, monthly payments in the [18] amount of \$3,038.75 each will be continued and paid to her for a period not to exceed twelve months and in no case beyond the date of her death.

2. Mr. Wolfe hereby accepts this annuity settlement as a complete discharge of any and all pension obligations of the Standard Company, the Anglo Company and any other associated companies.

3. In consideration of Mr. Wolfe's valuable services to the Anglo Company, the Anglo Company has paid to the Standard Company, as a contribution toward the cost of the annuity settlement, the sum of £89,120-0-0, the receipt of which sum the Standard Company doth hereby acknowledge.

4. In consideration of the aforesaid payment the Standard Company hereby indemnifies and for all time agrees to keep indemnified the Anglo Company from and against any liability which the Anglo Company might otherwise have had to Mr. Wolfe in respect to a pension.

5. If Mr. Wolfe shall die prior to July 1, 1940, then the Standard Company will forthwith on the death of Mr. Wolfe being proved to their reasonable satisfaction repay to the Anglo Company the £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof with interest thereon at

the rate of 3% per annum from the date of payment until the date of repayment.

6. If Mr. Wolfe shall die on or after July 1, 1940, then the Standard Company shall be under no obligation to repay to the Anglo Company any portion of the sum of £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof.

The sum of £89,120-0-0, stated in paragraph 3 of the agreement dated March 22, 1940, had been paid by Anglo to Standard as follows: £87,177-0-0 on August 22, 1939, which was converted into \$408,097.33 in United States currency at the official rate of exchange on that date, and £1,943-0-0 on December 31, 1939, which was converted into \$7,689.42 in United States currency at the official rate of exchange on that date. Petitioner had no control over the payments of the £89,120-0-0 by Anglo to Standard in 1939 and he paid no income tax to England or Canada on said sums.

Petitioner retired from the employ of Anglo on July 1, 1940. At this date he was 60 years of age. Beginning with a payment on July 31, 1940, petitioner received \$3,038.75 per month down to the date of the trial pursuant to said contract dated March 22, 1940. Standard has withheld income tax from these monthly payments made to petitioner.

Opinion

Disney, Judge: Petitioner contends that the monthly payments received by him from Standard are an annuity and that he is taxable on the amount

received under section 22 (b) (2) of the Internal Revenue Code.¹ His argument is limited to the following points: [19]

I. The amounts received by petitioner from Standard Oil Company of New Jersey were received as an annuity under an annuity contract.

II. The amount paid by Anglo-American Oil Company, Ltd., to Standard Oil Company of New Jersey was the aggregate premium or consideration paid for such annuity.

¹Sec. 22. Gross Income.

* * * * *

(b) Exclusions From Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter.

* * * * *

(2) Annuities, Etc.—

(A) In General.—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. * * *

The respondent contends, in substance, that the amounts received by the petitioner represent not an annuity, but additional compensation for services, and are therefore taxable in full, and that, even if the payments received are an annuity, the petitioner is taxable in full because he contributed none of the cost of the annuity.

Our first inquiry, therefore, is whether the payments are "Amounts received as an annuity under an annuity * * * contract," within the text of section 22 (b) (2) of the code. If so, only 3 per cent of the consideration or aggregate premiums paid is taxable (at least if paid by the petitioner, and that question we need not decide just here in considering only and primarily whether the payments were received as an annuity under an annuity contract).

After close study of the facts before us, we are of the opinion that the amounts were not received as an annuity under an annuity contract, but were received as a pension in consideration of services rendered in prior years. We can not and should not close our eyes to the realities presented in this case. By petitioner's own words he says that it was his understanding when he undertook the assignment of chairman and managing director of Anglo, at the request of Standard, that if he were eventually retired from the services of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo in effect on the date of retirement and that payments of such pension in sterling would be guaranteed by Standard in dollars at an exchange rate of \$5 to the pound. The agreement

of March 22, 1940, contains the following paragraph:

And Whereas, the Anglo Company desires to recognize Mr. Wolfe's valuable services to the Anglo Company by contributing to the Standard Company a capital sum of £89,120-0-0 representing the liability which it would have incurred had it granted Mr. Wolfe a sterling pension equivalent to that payable under the superannuation scheme of the Anglo Company.

Soon after arriving in England the petitioner discussed the matter of his retirement with officers of Anglo, and after some discussion it was decided that he was entitled to service as of June, 1902, (the date [20] when he entered the employ of Queen City Oil Co., Ltd., predecessor of, and absorbed by, Imperial Oil Co., Ltd., which was owned largely by Standard), and on October 22, 1931, the resolution of the directors of Anglo stated, "that for the purpose of calculating pension payable by this Company to him," his services should be deemed to commence from June, 1902, "and that he be entitled to pension on the same basis as employees benefiting under the Company's Superannuation Scheme." Thus it is seen that, though he did not come strictly within the provisions of Anglo's superannuation plan, he was to be treated as if he did—"entitled to pension on the same basis' as employees so situated. (Emphasis supplied.) The procedure finally carried out was a mere way of effectuating a pension for the petitioner. It was not, in form, any usual commercial annuity. Such an annuity was, in fact, considered, and the idea not carried out.

In our opinion, the arrangement carried out here provides "benefits from a retirement fund" in the nature of pension compensating for services rendered. The petitioner actually received money in the taxable years. It is clearly within the broad sweep of income as defined by section 22 (a),² and, the Commissioner having determined it to be such, it is petitioner's burden to demonstrate otherwise. So attempting, he relies primarily on section 22 (b) (2). The provision thereof, so far as here involved, is summed up in the words "annuity" and "annuity contract." Their usual connotation does not, in our view, encompass the plan carried out in this matter; and no sound ground is suggested for broadening the concept to cover the contract here considered. The petitioner suggests that it was an annuity because Standard might make a profit or suffer a loss in its execution, depending on the length of life of the petitioner, and relies on a definition of

²Sec. 22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *.

annuities in the law of New York. Such law does not control interpretation of section 22 (b) (2), and we see nothing in the possibility of profit or loss to Standard to cause consideration of a plan for additional compensation as an annuity. Nor does the fact that Regulations 111, sec. 29.22 (b) (2)-2, states that amounts received as an annuity "include" amounts received in periodic installments, demonstrate that we have an annuity here. The regulation does not say that every periodic payment is annuity. [21]

We regard this case as in essence analogous in principle to *Hooker v. Hoey*, 27 Fed. Supp. 489; *affd.*, 107 Fed. (2d) 1016, where it was held that there was no annuity. There, too, the payments were made to reward long service. No annuity contract was purchased, the employer, Vacuum Oil Co., making payments until its property and obligations were transferred to Standard Oil Co. of New York, which, under its new name of Socony Vacuum Corporation, continued the payments, including the one in question. Though the retirement plan was called "Annuity Plan," just as here the word annuity is sometimes, though not always, used, the court regarded the name of "no particular importance," adding: "It was manifestly a pension plan, a retirement allowance plan, and the payments made under it were payments of pensions or retiring allowances." Referring to the change from one corporation to another as payor, the court said that "All that happened was that Socony Vacuum Corporation took the place of Vacuum Oil Co. as payor of

his pension or retiring allowance." So here we think Standard of New Jersey merely took the place of Anglo and the earlier companies, so far as obligation for pension retirement was concerned. The court in the Hooker case, referring to the contention that there was annuity because of the assumption by Socony Vacuum of the obligation of Vacuum, says:

* * * In the first place, the plaintiff has no annuity, within the meaning of that word in section 22 (b) (2). He has a pension or retirement allowance, taxable under section 22 (a) of the Act as already shown. The exemption as to annuities in the income tax statute does not cover cases where an annuity is not in reality purchased, even though the transaction may be somewhat analogous to the purchase of an annuity. *Holvering v. Butterworth*, 290 U. S. 365, 369, 370, 54 S. Ct. 221, 78 L. Ed. 365. In the second place, the transaction involving transfer of assets by the Vacuum Oil Company and assumption of liabilities by Socony Vacuum Corporation was not an "annuity contract," except in a forced sense. * * *

We think there is not here more than in a very "forced sense" an "annuity contract" by virtue of the arrangement between petitioner and the two companies. In this connection we should recall that the amounts paid the petitioner were based upon service from 1902, when he entered the employ of Queen City Oil Co., later absorbed by Imperial Oil Co., owned largely by Standard, and continuing through the approximately ten years of employment

by Anglo, Standard stock controlled. If, as in effect the petitioner argues, Anglo simply purchased an annuity contract from Standard as a mere vendor thereof, why should it be based in part on service rendered for earlier employers? But it extends back to Queen City Oil Co. That company's part of any retirement fund was, when it was "absorbed" by Imperial, passed to Imperial in effect in the same way as in the *Hooker v. Hoey* case. Absorption of a corporation by another involves obligations, [22] if any, as well as assets. Then we see that, at the request of Standard and on the understanding and guaranty of Standard that petitioner would receive a pension, he undertook the "assignment" with Anglo, and finally Standard, "in consideration of the aforesaid understanding," agreed to pay petitioner the \$3,038.75 per month for life, Anglo making a "contribution" to the fund necessary. The letter of January 9, 1940, from Standard to Anglo states that "Standard will "guarantee Mr. Wolfe that the money which you have provided, plus the additional amounts which Standard * * * will be required to put up, will be used to assure him the annuity to which he is entitled." (Emphasis supplied.)

It thus becomes clear, in our view, that Standard is no simple seller of an annuity, but in effect is taking over retirement obligations of its affiliate, Imperial (covering from about 1911 or 1912 to 1931, at least half of the whole period covered, and about twice as long as the period with Anglo)—in the same way, in substance, as was done by Standard of New

York in the Hooker case; and that, moreover, the stock control by Standard of Anglo (through Standard Oil Export Corporation) indicates reason, further than the "contribution" by Anglo, for Standard taking over payment of the pension. To the extent of at least about two-thirds of the period on which retirement was based, Standard is in a position similar to that of Standard of New York in the Hooker case, and even more directly itself the payor of its own pension obligation because of the understanding it had with petitioner when he took the assignment to Anglo. Though the petitioner seeks to distinguish the Hooker case, on the ground that there was assumption of liabilities by the successor corporation (which paid the "annuity"), whereas here Anglo paid money to Standard, we think there is no real distinction. In that case Vacuum Oil Co. transferred property to Standard of New York, which assumed Vacuum's obligations and liabilities (including, of course, the liability to pay the "annuity"), and thereafter paid the petitioner such "annuity"; whereas herein Anglo paid Standard of New Jersey money, and Standard paid petitioner. There can be no real difference between the transfer of assets by Vacuum and the transfer of money by Anglo. There was consideration in both cases for the payment to the petitioners. In *Ware v. Commissioner*, Fed. (2d) (Jan. 29, 1947), property was exchanged for fixed monthly installments to be paid during lifetime and it was held that the fact of conveyance of property did not prevent the payments from being annuities; therefore, in the

Hooker case it would make no difference whether the assumption of liabilities was because of receipt of property, instead of money.

The 89,120 English pounds paid to Standard of New Jersey by Anglo was in the words of the agreement of March 22, 1940, merely "a [23] contribution toward the cost of the annuity settlement." (Emphasis supplied.) The letter of March 22, 1940, forwarding the agreement to Anglo, also refers to Anglo's "contribution." Moreover the agreement expressly states that the petitioner "undertook this assignment [with Anglo] at the request of the Standard Company on the understanding that if he were eventually retired from the service of the Anglo Company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo Company * * * and that payment of such sterling pension would be guaranteed by the Standard Company." This language makes it plain that Standard and petitioner had had an understanding, from prior to the Anglo "assignment" and that it was backed by Standard's guaranty.

The contract of March 22, 1940, recognizes previous obligations on the part of Standard, for petitioner "accepts this annuity settlement as a complete discharge of any and all pension obligations of the Standard Company, the Anglo Company and any other associated companies." (Emphasis supplied.) Standard is thus again seen to be involved in this matter, not as a mere seller of an annuity contract, but by virtue of its previous commitments and affiliations. The letter of August 4, 1939, from

Anglo to Standard states that "the procedure entails obligations on all parties." Also, the letter of August 20, 1931, passing between Standard's "Secretary of Annuities and Benefits Committee" and the officer "in charge of foreign sales" reveals that if Anglo's annuity plan did not "fully take care of Mr. Wolfe's case * * * the matter will have to be given special consideration"; and notations on that letter state that Anglo is to adopt the same rules basically as Standard "with such additions as will care for employees of their own subs."³ To us this indicates that Standard had a duty to Wolfe; otherwise, Standard would not be concerned with his annuity—the matter would not "have to be given special consideration."

Moreover, the notations indicate the general idea of a company associated with Standard taking care of the "employees of their own subs.," and explains Standard's interest in retirement for Wolfe from 1902 to 1940. It appears further that Standard itself is contributing to the retirement fund. The letter of January 9, 1940, shows that Wolfe's retirement would require the money Anglo provided "plus the additional amounts which Standard * * * will be required to put up." There is no showing that £89,120 was required to cover petitioner's retirement, so far as concerned the years of service with Anglo,

³This instrument was read into the transcript, but placed, marked "read into the record," among the exhibits. We quote from the instrument, which obviously was misread, the transcript reading "service" instead of "subs."

and the evidence indicates otherwise. We note also that in the letter from Standard dated June 29, 1939, it is stated, "it is further proposed that Anglo transfer to S. O. of N. J. for deposit to the sub-account for [24] assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability." This has the sound of mere contribution by Anglo to a general fund, rather than purchase of annuity. Moreover, a computation sent under date of June 21, 1939, by Standard's secretary of its annuities and benefits committee to one Pierce of that company, shows "total cost" as \$467,165, assuming retirement at July 1, 1940, and his "annuity" to be \$34,131. The \$34,131 is, according to the computation, the annuity in dollars at \$4.68 a pound, whereas Wolfe was actually paid at \$5 a pound, or \$36,465 (\$3,038.75 a month). "Total cost" would therefore appear to be higher than \$467,165. The amount "contributed" by Anglo, at then current exchange rates, was \$415,786.75. All this appears to mean that the amount of money necessary to produce even \$34,131 per year was \$467,165. If so, Anglo obviously did merely "contribute." If it cost about \$467,165 for an "annuity" of \$34,131, one of \$36,465 would, ratably figured, cost about \$499,111, which is not greatly different from what is indicated by the estimated figure of \$491,000 in pencil notations at the bottom of the letter of August 4, 1939, from Carder of Anglo to Pierce. Since Anglo paid only about \$415,000, the \$491,000 figure was apparently placed on the letter by some one with Standard. Since £87,177 was the amount stipulated to have been paid originally by

Anglo, we conclude that that amount, and the £1,943 later paid, was merely cost to that company. Moreover, even if Anglo was providing the entire amount necessary, it is obvious from the fact of coverage of years prior to service with Anglo that it was doing so because of its relation to Standard, and not because the approximately 10 years of service performed by petitioner for Anglo required the "contribution" of the full amount of 89,120 pounds sterling. We can not say, on all such evidence, that Anglo purchased an annuity from Standard.

We conclude and hold that the moneys received by the petitioner in the taxable year were not "Amounts received as an annuity under an annuity * * * contract," within the language of that section. Nor is the contract made in 1940 otherwise shown to have been a contract taxable to the petitioner in 1940 (though not reported by him as Federal income or to Canada or England.)

The petitioner upon brief argues and particularly emphasizes that: "The petitioner, in 1940, was a non-resident alien, and income received by him from sources outside the United States was not subject to tax in the United States." He therefore argues that he was "clearly not liable" to the United States. In addition to the above admission, in effect, it is not shown that he was liable to taxation by Great Britain or Canada upon the "annuity" or pension retirement contract of March 22, 1940. Therefore, strictly speaking, such nontaxability by the United States and failure to show taxability by any other country [25] involved, justifies the conclusion that

the petitioner has not shown himself entitled to the deduction claimed; for, in *Charles L. Jones*, 2 T. C. 924, we considered, as here, a claim for deduction of the amount annually received under a "service annuity" contract purchased by his employer from an insurance company in a previous year, and, after reviewing *Renton K. Brodie*, 1 T. C. 275, and others along that line, we said that:

* * * Congress intended to limit the deduction under section 22 (b) (2), supra, to the aggregate premiums or consideration paid by the annuitant except where, as in the Deupree and Brodie cases, supra, the annuitant has been in receipt of taxable income in the year in which the annuity was purchased for him by his employer. (Emphasis supplied.)

We approved taxation to the petitioner of the annual amount received from the insurance company. So, if the petitioner had not "taxable income" in 1940 in the "annuity" funds, he had nothing to recover tax-free later.

The contract of March 22, 1940, was, in effect, a mere agreement, in written form, to carry out the previous arrangement and agreement under which petitioner had worked and to pay additional compensation therefor. It was in no ordinary negotiable or assignable form, though we rely on that fact only as indicative of the intention of the parties. In our opinion, this is not the class of contract taxable at value to the recipient. The contracts in *Renton K. Brodie*, supra; *William E. Freeman*, 4 T. C. 582; *Hubbell v. Commissioner*, 150 Fed. (2d) 516; *Oberwinder v. Commissioner*, 147 Fed. (2d) 255; *Robert P. Hackett*, 5 T. C. 1325, and *Ward v. Commissioner*,

.... Fed. (2d) (Feb. 10, 1947), cited by the petitioner, and all cases found by us following them, were all ordinary commercial annuity contracts, purchased by employers from insurance companies for employees; therefore, the fact that they were held taxable to the recipients is no indication that an agreement here by Anglo and Standard to carry out their pension policy should be considered to have such value as to be taxable to the petitioner as recipient, and therefore offer reason to allow exemption from tax amounts received in later years under the contract.

Reviewed by the Court.

Decision will be entered for the respondent.

[Seal]

The Tax Court of the United States,
Washington, D. C.
Docket No. 7287

FREDERICK JOHN WOLFE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated March 31, 1947, it is Ordered and Decided: That there is a deficiency in income tax of \$1,101.49 for the year 1941.

[Entered]: April 1, 1947.

/s/ R. L. DISNEY,
Judge.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED STATES

To the Honorable the Circuit Justice and Circuit
Judges of the United States Circuit Court of
Appeals for the Ninth Circuit:

Taxpayer, the petitioner in this cause, by William Galbally, Jr., counsel, hereby files his petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States entered on April 1, 1947, 8 T. C.—, No. 76, determining a deficiency in the petitioner's federal income taxes for the calendar year 1941 in the sum of \$1,101.49, and respectfully shows:

First: The Petitioner, Frederick John Wolfe, is an individual residing at the present time at Avenida Alvear 1572, Buenos Aires, Argentina. [28]

Second: The controversy involves the proper determination of the petitioner's liability for federal income taxes for the calendar year 1941.

The petitioner, an individual, is a Canadian citizen and became a resident of the United States on or about October 4, 1941. Intermediate March 1931 and October 1941 petitioner was a resident of the United Kingdom, residing at London, England. During 1931, the petitioner became Chairman of the Board and Managing Director of the Anglo-American Oil Company, Ltd., an English corporation. During 1931, it was agreed by and between peti-

tioner and Anglo-American Oil Company, Ltd., that upon his retirement from the company's employment he would be given an annuity computed in accordance with the provisions of the company's superannuation plan in effect at the date of petitioner's retirement. Petitioner was not eligible to participate in said superannuation plan, as such plan was not applicable to any person entering the employ of the company subsequent to May 18, 1928. For the purposes of computing the annuity due petitioner, he was treated as if he had been in the employ of the company since June 1902, when petitioner entered the employ of the Queen City Oil Company, Ltd., a Canadian corporation.

On March 22, 1940, the Anglo-American Oil Company, Ltd., the Standard Oil Company of New Jersey and petitioner entered into an agreement under which, in consideration of the services rendered by petitioner to Anglo-American Oil Company, Ltd., [29] said Anglo-American Oil Company, Ltd., agreed to pay to Standard Oil Company of New Jersey the sum of eighty-nine thousand one hundred and twenty pounds sterling (£89,120-0-0) or the equivalent in United States currency of four hundred and fifteen thousand seven hundred and eighty-six and 75/100 dollars (\$415,786.75), and Standard Oil Company of New Jersey agreed to pay petitioner a life annuity of three thousand and thirty-eight and 75/100 dollars (\$3,038.75) per month, and a like sum to petitioner's wife, Marguerite B. Wolfe, for one year after the death of petitioner, if she should survive petitioner.

Petitioner retired from the services of Anglo-American Oil Company, Ltd., on or about July 1, 1940.

Pursuant to said contract of March 22, 1940, the Standard Oil Company of New Jersey paid to petitioner each month from the date of his retirement to the present time the sum of three thousand and thirty-eight and 75/100 dollars (\$3,038.75). The amount received by petitioner intermediate October 4, 1941 and December 31, 1941 was the sum of eight thousand eight hundred twenty-two and 18/100 dollars (\$8,822.18).

In his income tax return for the year 1941, petitioner included as gross income on account of the payments received from the Standard Oil Company of New Jersey the sum of three thousand and thirty-eight and 75/100 dollars (\$3,038.75), which amount was computed in accordance with the provisions of section 22 (b) (2) of the Internal Revenue Code. [30]

Upon the audit of the petitioner's return for the year 1941, the Commissioner of Internal Revenue determined that the provisions of section 22 (b) (2) were inapplicable to the payments received by the petitioner from the Standard Oil Company of New Jersey, including the entire sum of eight thousand eight hundred twenty-two and 18/100 dollars (\$8,822.18) received by the petitioner intermediate October 4, 1941 and December 31, 1941 in his gross income for said year and determined a deficiency in tax of one thousand one hundred one and 49/100 dollars (\$1,101.49).

Third: The court by which review is sought is the United States Circuit Court of Appeals for the Ninth Circuit.

Fourth: The petitioner, an individual, at the time and in the manner required by law, made and filed his United States income tax return for the calendar year 1941 with the office of the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California. Said office of the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, is located in the Ninth Judicial Circuit of the United States.

Fifth: On April 1, 1947, the Tax Court of the United States rendered a decision determining a deficiency of income tax of the petitioner for the calendar year 1941. The alleged liability of the petitioner for the said deficiency arises in respect of the taxes, a return for which was filed as alleged in paragraph fourth herein.

Wherefore, Frederick John Wolfe petitions for review [31] of said decision of the Tax Court of the United States.

/s/ WILLIAM GALBALLY, Jr.,
Attorney of Record for
Petitioner.

[Endorsed:]: Filed June 25, 1947. [32]

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the petitioner on the 25th day of June, 1947, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the petition for review is hereto attached and served upon you.

Dated at Los Angeles, California, this 25 day of June, 1947.

Respectfully,

/s/ WILLIAM GALBALLY, Jr.,
Attorney for Petitioner.

Personal service of the foregoing notice, together with a copy of the petition for review mentioned therein, is hereby acknowledged this 25th day of June, 1947.

/s/ J. P. WENCHEL, CAR
Chief Counsel, Bureau of
Internal Revenue
Attorney for Respondent.

[Endorsed]: Filed Jun. 25, 1947. [34]

[Title of Tax Court and Cause.]

PETITIONER'S CONCISE STATEMENT OF
THE POINTS ON WHICH HE INTENDS
TO RELY ON THE REVIEW BY THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT OF
THE DECISION IN THIS PROCEEDING
OF THE TAX COURT OF THE UNITED
STATES

The following is a concise statement of the points on which the petitioner intends to rely on the review by the Circuit Court of Appeals for the Ninth Circuit, of the decision in this proceeding of the Tax Court of the United States.

1. The Tax Court of the United States erred in failing to find as a fact that the agreement of March 22, 1940, quoted in the eleventh paragraph of the findings of fact was executed by the petitioner and Standard Oil Company of New Jersey within the State of New York and by Anglo-American Oil Company, Ltd., at London, England.

2. The Tax Court of the United States erred in failing to find as a fact that the official rate of exchange on [35] March 22, 1940, was \$3,7243.05 in United States currency for each English pound.

3. The Tax Court of the United States erred in failing to find as a fact that the official rate of exchange on July 1, 1940, was \$4.035 in United States currency for each English pound.

4. The Tax Court of the United States erred in failing to find as a fact that the deficiency from the determination of which this appeal was taken to the Tax Court of the United States was based upon a determination of the petitioner's taxable net income for the calendar year 1941, in which computation no part of the annuity paid to the petitioner by the Standard Oil Company of New Jersey was excluded from the petitioner's gross income.

5. The Tax Court of the United States erred in failing to find as a fact that petitioner did not, prior to March 1, 1931, discuss with any official of Standard Oil Company of New Jersey or Standard Oil Export Company the question of his retirement pay in the event of his eventual retirement.

6. The Tax Court of the United States erred in failing to find as a fact that the question of petitioner's retirement pay in the event of his eventual retirement was never, prior to March 1, 1931, mentioned in the conversations between petitioner and officials of Standard Oil Company of New Jersey and Standard Oil Export Corporation in any [36] way, shape or form.

7. The Tax Court of the United States erred in failing to find as a fact that the facts stated in the paragraph beginning "Whereas" of the contract between petitioner, Anglo-American Oil Company, Ltd. and Standard Oil Company of New Jersey, set forth in the eleventh paragraph of the findings of fact, are true except that there was no understanding with any officer of Standard Oil Company of New Jersey or of Imperial Oil Company that if

petitioner were eventually retired from the service of Anglo-American Oil Company he would receive a life annuity based on the provisions of the superannuation scheme of Anglo-American Oil Company as in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard Oil Company of New Jersey at an exchange rate of five dollars to the pound.

8. The Tax Court erred in finding as a fact that when the petitioner undertook the assignment of Chairman and Managing Director of Anglo-American Oil Company, Ltd., at the request of Standard Oil Company of New Jersey, it was the understanding that if he were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo-American Oil Company, Ltd. in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard Oil Company of New Jersey in dollars at an exchange rate of five dollars to the pound. [37]

9. The Tax Court of the United States erred in failing to find as a fact that when petitioner went to London in 1931 he was not eligible to participate in the superannuation scheme of Anglo-American Oil Company, Ltd., because the superannuation scheme had been changed to preclude participation by anybody who came into the company after some time in May 1928.

10. The Tax Court of the United States erred in failing to find as a fact that the resolution of the

Board of Directors of Anglo-American Oil Company, Ltd., quoted in the fifth paragraph of the findings of fact, was communicated to the petitioner under date of October 23, 1931, in a memorandum signed by the Secretary of Anglo-American Oil Company, Ltd.

11. The Tax Court of the United States erred in failing to find as facts that during the time the petitioner served as Managing Director and Chairman of Anglo-American Oil Company, Ltd., neither the Standard Oil of New Jersey nor the Standard Oil Export Corporation ever dominated the administration policies of Anglo-American Oil Company, Ltd.; that Anglo-American Oil Company, Ltd., bought oil and gasoline from sundry people; that Anglo-American Oil Company, Ltd. bought oil and gasoline from Standard Oil Company of New Jersey and from others; and that the administration policies of Anglo-American Oil Company, Ltd., were left entirely and absolutely in the hands of the Board of Directors of Anglo-American Oil Company, Ltd. [38]

12. That the Tax Court of the United States erred in failing to find as a fact that the superannuation scheme of Anglo-American Oil Company, Ltd. was not in a very healthy position because of the state of some of its investments, and that from time to time the Board of Directors of Anglo-American Oil Company, Ltd. made very liberal contributions to the superannuation fund to take care of the liabilities Anglo-American Oil Company, Ltd. owed to those who were under the plan.

13. The Tax Court of the United States erred in failing to find as a fact that the petitioner wanted an annuity payable in dollars because he had been advised by his physician on many occasions that England was was not a proper climate for him, and he intended to go to the United States upon his retirement.

14. The Tax Court of the United States erred in failing to find as a fact that in 1939 the secretary of Anglo-American Oil Company suggested that the problem of the petitioner's annuity might be worked out by Anglo-American Oil Company, Ltd. sending over a certain amount of money to Standard Oil Company of New Jersey and that the latter would pay the annuity.

15. The Tax Court of the United States erred in failing to find as a fact that pursuant to the resolution of the Board of Directors of Anglo-American Company, Ltd., dated October 22, 1931, the said company was obligated to pay [39] petitioner a pension upon retirement, of the sum of seven thousand two hundred ninety-three pounds (£7,293-0-0) per annum.

16. The Tax Court of the United States erred in failing to find as a fact that the petitioner was never in the employ of Standard Oil Company of New Jersey.

17. The Tax Court of the United States erred in failing to find as a fact that petitioner was never in the employ of Standard Oil Export Corporation.

18. The Tax Court of the United States erred in failing to find as a fact that in 1931, when the petitioner became Chairman of the Board of Directors

of Anglo-American Oil Company, the stock of Anglo-American Oil Company was not stock controlled by Standard Oil Company of New Jersey.

19. The Tax Court of the United States erred in failing to find as a fact that petitioner considered that Anglo-American Oil Company had an obligation to make retirement payments of some kind to him prior to the agreement of March 22, 1940; that they were obligated only to pay an annuity based on his services and in accordance with their scheme of superannuation; and that was their only obligation to the petitioner prior to the agreement of March 22, 1940.

20. The Tax Court of the United States erred in failing to find as a fact that at the time the [40] petitioner became an employee of the Anglo-American Oil Company, there was no correspondence or other writing entered into between himself and Anglo-American Oil Company, Ltd. and Standard Oil Company of New Jersey; that petitioner did not ever have any writing to evidence that he was being offered an executive position with Anglo-American Oil Company, Ltd.

21. The Tax Court of the United States erred in failing to find as a fact that there was no type of contract entered into between petitioner and anybody else as to his employment by Anglo-American Oil Company.

22. The Tax Court of the United States erred in receiving in evidence testimony to the effect that the petitioner did not pay a tax to England on the £89,120 paid by the Anglo-American Oil Company to Standard Oil Company of New Jersey.

23. The Tax Court of the United States erred in admitting to evidence testimony from the petitioner as to the purpose of Standard Oil Company of New Jersey in withholding a part of the monthly payments made to the petitioner.

24. The Tax Court of the United States erred in failing to find as a fact that while petitioner was living in England and an officer of Anglo-American Oil Company he did not prepare his own income tax returns; that they were prepared by the solicitor for the Anglo-American Oil Company, Ltd. [41]

25. The Tax Court of the United States erred in failing to find as a fact that the solicitor for the Anglo-American Oil Company, Ltd. who prepared the English income tax returns of the petitioner knew about the contract of March 22, 1940; that petitioner had told him about that contract.

26. The Tax Court of the United States erred in failing to find as a fact that the solicitor for the Anglo-American Oil Company did not advise the petitioner as to whether or not the pounds paid by the Anglo-American Oil Company to Standard Oil Company of New Jersey were taxable to the petitioner in England.

27. The Tax Court of the United States erred in failing to find as a fact that petitioner did not know anything about that particular phase (that is, the question of whether or not pounds paid by Anglo-American Oil Company, Ltd. to Standard Oil Company of New Jersey were taxable to him in England) of the English income tax law.

28. The Tax Court of the United States erred in failing to find as a fact that no tax was withheld on the £89,120 paid by Anglo-American Oil Company, Ltd. to Standard Oil Company of New Jersey.

29. The Tax Court of the United States erred in failing to find as a fact that the petitioner paid income taxes to England on his salary of £11,000 per year received [42] from Anglo-American Oil Company, Ltd.

30. The Tax Court of the United States erred in admitting the testimony of the witness, Kenneth N. Rackley, to the effect that he was familiar with the policy of Standard Oil Company of New Jersey with regard to the retirement of its employees.

31. The Tax Court of the United States erred in admitting the testimony of the witness, Kenneth N. Rackley, to the effect that Standard Oil Company of New Jersey has never given a retiring employee a lump sum of money in lieu of pension payments, and that Standard Oil Company of New Jersey has never given a retiring employee a choice between receiving a lump sum of money and receiving the payments in the usual manner; and that such a lump sum payment would not be made in accordance with the policy of Standard Oil Company of New Jersey.

32. The Tax Court of the United States erred in failing to find as a fact that on January 12, 1940, Mr. Pierce wrote Mr. Carder as follows:

“When I wrote you the other day I failed to realize that you have a three-corner agreement

between Standard Oil of New Jersey and Mr. Wolfe, as a means of insuring that Anglo had discharged its liability for any premium payments to Mr. Wolfe.

“This phase of the case has not been adequately considered, and we are now undertaking to get our lawyers to agree to some formal release that will be agreed to before the annuity becomes payable on July the 1st. [43]

“You can be sure that this will be advanced as promptly as possible.”

33. The Tax Court of the United States erred in admitting to evidence testimony of the witness, Kenneth N. Rackley, to the effect that the file of Standard Oil Company of New Jersey contains no mention or discussion of paying a lump sum to the petitioner upon his retirement.

34. The Tax Court of the United States erred in failing to find as a fact that the witness, Kenneth N. Rackley, on June 21, 1939, addressed a memorandum to Mr. Pierce of Standard Oil Company of New Jersey, reading as does the matter on pages 32, 33 and 34 of the statement of evidence.

35. The Tax Court of the United States erred in failing to find as a fact that the file of Standard Oil Company of New Jersey contained a copy of a letter, signed by F. W. Pierce, to R. A. Carder, reading as does the matter quoted on page 35 of the statement of evidence.

36. The Tax Court of the United States erred in failing to find as a fact that the file of Standard Oil

Company of New Jersey contained a copy of a letter dated March 22, 1940 from Mr. Pierce to Mr. Carder, reading as does the matter quoted on page 36 of the statement of evidence.

37. The Tax Court of the United States erred in failing to find as a fact that the file of [44] Standard Oil Company of New Jersey contained a copy of a letter dated December 11, 1940, signed by W. D. Barcus, who was then on the staff of the Treasurer's Department of Standard Oil Company of New Jersey, to Mr. Roessle who was in charge of the overseas personnel office of Standard Oil Company of New Jersey, reading as does the matter at the bottom of page 37 and at the top of page 38 of the statement of evidence.

38. The Tax Court of the United States erred in refusing to admit in evidence a typical work sheet from the files of the Standard Oil Company of New Jersey.

39. The Tax Court of the United States erred in admitting in evidence the testimony of the witness, George S. Koch, to the effect that he participated in the decisions to make withholdings from the monthly payments made by Standard Oil Company of New Jersey to the petitioner; that such sums were withheld; and in admitting evidence as to why the witness, George S. Koch, directed Standard Oil Company of New Jersey to withhold such sums.

40. The Tax Court of the United States erred in failing to find as a fact that the witness, George S. Koch, in directing Standard Oil Company of New Jersey to withhold from the sums paid by Standard

Oil Company of New Jersey to petitioner gave his opinion; that in doing so he expressed his legal opinion as a lawyer; that it was his duty to protect Standard Oil Company of New Jersey; that any doubts would have been [45] resolved in favor of Standard Oil of New Jersey; that at the time the decision was made, the witness did not have any doubts; that he has since had doubts; and that the witness, George S. Koch, was simply advising his client, his employer, to do whatever would protect them most regardless of what happened to the petitioner.

41. The Tax Court of the United States erred in finding as a fact that petitioner had no control over the payment of the £89,120 by Anglo-American Oil Company to Standard Oil Company in 1939.

42. The Tax Court of the United States erred in concluding that the amounts received by petitioner were not received as an annuity under an annuity contract, but were received as a pension in consideration of services rendered in prior years.

43. The Tax Court of the United States erred in concluding that "the arrangement carried out here provides 'benefits from a retirement fund' in the nature of pension compensating for services rendered."

44. The Tax Court of the United States erred in concluding that if the petitioner had not "taxable income" in 1940 in the "annuity" funds, he had no cost to recover tax free later.

45. The Tax Court of the United States erred in entering its final order of redetermination that there is a [46] deficiency in income tax for the year 1941 in the amount of \$1,101.49.

46. The Tax Court of the United States erred in failing to enter a final order of redetermination that there is no deficiency in income taxes for the year 1941.

47. The decision of the Tax Court of the United States is contrary to the law and regulations and is not supported by substantial evidence.

48. The Tax Court of the United States is an administrative agency within the scope of the Administrative Procedure Act (Public Law 404, 79th Congress, Chapter 324, Second Session) and its decisions are subject to review as provided in said Act.

/s/ WILLIAM GALBALLY, Jr.,
Attorney for Petitioner.

Personal service of a copy of the foregoing statement of points is hereby acknowledged this 31st day of July, 1947.

/s/ CHARLES OLIPHANT, CAR
Acting Chief Counsel, Bureau
of Internal Revenue.

[Endorsed]: Filed July 31, 1947.

[Title of Tax Court and Cause.]

STATEMENT OF EVIDENCE

The following is a statement (excluding those portions thereof covered by the findings of fact and as to which there is no controversy on the appeal) of evidence in narrative form in the above-entitled cause.

The evidence was presented at New York, New York, on October 7, 1946, before the Honorable Richard L. Disney, Judge. (R. p. 1) There was filed a partial stipulation of facts signed by counsel for both parties (without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts stipulated), and the facts therein set forth were received in evidence. (R. pp. 10-11) The pertinent portions of said facts (for the purposes of this statement) are as follows:

Under date of March 22, 1940, the agreement quoted in the eleventh paragraph of the findings of fact was entered into. Said agreement was executed by petitioner and Standard Oil Company of New Jersey within the State of New York at the office of the latter at 30 Rockefeller Plaza, New York, New York, and by Anglo-American Oil Company, Ltd., at London, England. (Paragraph 1, Partial Stipulation of Facts; Exhibit 1-A).

The official rate of exchange on March 22, 1940, was \$3.724305 in United States currency for each English pound. The official rate of exchange on July 1, 1940, was \$4.035 in United States currency

for each English pound. Said official rates of exchange are as certified to the Secretary of the Treasury by the Federal Reserve Bank of New York. (Paragraph 3 Partial Stipulation of Facts).

FREDERICK J. WOLFE

the petitioner, was called as a witness on his own behalf, and being first duly sworn testified as follows:

On Direct Examination

I am the petitioner in this proceeding. At the time the petition was filed I resided in California. I now reside in New York. I always have been a citizen of Canada. (R. p. 12) In June, 1902, I joined the Queen City Oil Company, which is a Canadian corporation. The Queen City Oil Company was later absorbed by the Imperial Oil Company, the stock of which company [49] is largely held by Standard Oil Company of New Jersey. I was only more or less of a junior clerk at the time, but I would say the absorption of the Queen City Oil Company by the Imperial Oil Company took place around about 1911 or 1912. That is just my impression. I continued in the employ of the Imperial Oil Company until I left for England on March 1, 1931, at which time I was Vice-President and a member of the Board of Directors. (R. p. 13) On March 1, 1931, I went to England to take the position as Managing Director of Anglo-American Oil Company, Ltd. (R. pp. 13-14)

(Testimony of Frederick J. Wolfe.)

Prior to March 1, 1931, I would say two or three months prior to that, Mr. G. Harrison Smith, who was the senior Vice-President of Imperial Oil Company, Ltd., asked me if I would go to England to take over the duties as Managing Director of Anglo-American Oil Company, Ltd. I said I would go. Imperial Oil Company was largely owned by Standard Oil Company of New Jersey. (R. p. 14) I had conversations with executives of Standard Oil Company of New Jersey with respect to the matter of my going to England to take over this new position. (R. pp. 14-15) I talked with several of the executives. I talked to Mr. Teagle, who was then President of the Company; Mr. Hunt, who was one of the vice-presidents; Mr. James Moffett, who was one of the vice-presidents; and Mr. D. L. Harper, who was President of the Standard Oil Export Corporation. I talked to these gentlemen in the Standard Oil Company of New Jersey [50] largely to get the background of the Anglo-American Oil Company, Ltd., which company I was going to operate.

Anglo-American Oil Company, Ltd., was stock-controlled by the Standard Oil Export Corporation, which in turn was controlled by the Standard Oil Company of New Jersey. (R. p. 15) It owned the stock.

In response to the question:

“In your conversations with Mr. Smith, did you discuss compensation, that is, what salary you were to get?”

(Testimony of Frederick J. Wolfe.)

the witness answered:

“I think I did, with Mr. Smith and several of these other . . . ”

The witness continued:

I did discuss the salary I was to receive.

I did not at any time discuss with Mr. Smith, Mr. Teagle, Mr. Hunt or any of the other gentlemen whose names I have mentioned, the question of my retirement pay in the event of my eventual retirement. It was never mentioned,—not in any way, shape or form. (R. p. 16)

The facts stated in the paragraph beginning “Whereas” of the contract between myself, Anglo-American Oil Company, Ltd. and Standard Oil Company of New Jersey, set forth in the eleventh paragraph of the findings of fact, are true with one reservation [51] (R. p. 17) I would say that the paragraph is absolutely right, except that there was no understanding with any officer of the Jersey company or of the Imperial Oil Company, Ltd. (R. p. 18) The understanding stated in that paragraph was my understanding. I had not discussed the matter with any official of Standard Oil Company of New Jersey or the Imperial Oil Company, Ltd. (R. p. 20)

On or about July 1, 1931, I became Chairman of the Board of Directors of Anglo-American Oil Company, Ltd., and continued in that capacity and as Managing Director until my retirement on July 1, 1940, at which time I was both Managing Director and Chairman of the Board. In an English com-

(Testimony of Frederick J. Wolfe.)

pany the duties of a chairman are more or less similar to those of a president of a company in the United States. In England we have few, very few presidents. In other words, it might almost be said that the positions of chairman and president in the two countries are reversed. The chairman is an operating man and only in very large companies—in fact I know of only half a dozen,—are there such things as presidents. Anglo-American Oil Company, Ltd., did not have a president. (R. p. 21)

The managing director, I imagine, would (R. p. 21) be more or less similar to what you call over here, an executive vice-president.

When I first went to London,—after I went to London, I had discussions with executives of the Anglo-American [52] Oil Company, Ltd., with respect to my retirement pay on my eventual retirement. I discussed it with several executives over there, chiefly with Mr. Carder, who at that time was secretary of the company. I also discussed it with Mr. Jenkins, the Assistant Secretary, but only in a limited way.

Mr. Carder was the Secretary of the company. He was in charge of finance. He looked after the superannuation plan. He was in charge of all accounting. He was not only, in addition to being (R. p. 22) the general secretary of the company, that is, attending Board meetings and recording the minutes, but he also was an operating man in that he looked after all bookkeeping. You might say he was a controller.

(Testimony of Frederick J. Wolfe.)

I found, when I went over there, so far as I was concerned, with respect to the superannuation scheme of Anglo-American Oil Company, Ltd., I was not eligible because the scheme had been changed to preclude participation by anybody who came into the company after some time in May, 1928. I further found that the plan, the funds of the scheme, were invested in stocks which I did not consider investment stocks; in other words, I would think more or less that the fund was not in a very sound financial condition. (R. p. 23)

In the case of a man who was retiring at the age of 65, the amount he would receive under the superannuation scheme of Anglo-American Oil Company, Ltd., would depend on the number of years that he had been with the company. Age 65 was the retirement age for males. (R. pp. 23-24) It was lower than that for females. But at age 65 he would be entitled to two per cent. of his average salary for the past five years, with a maximum of 75 per cent. of that average five year salary. He would be entitled to that as an annual annuity as long as he lived. For example, suppose the man for the last five years of his service had earned an average of £1,000 a year and he had worked for the company for ten years. Two per cent. of £1,000 would be £20. Ten times that would be £200, which would be his annuity for his life. (R. p. 24) This same scheme was available to a man who retired at the age of 60, but he would have to take a discount. (R. pp. 24-25) That discount, if he were eligible for the

(Testimony of Frederick J. Wolfe.)

full 75 per cent., would reduce his annuity to $66\frac{1}{3}$ per cent. It is my recollection that that is how it was. In other words, if he had been there long enough, 30 years, or 33 years, or 34 years, the maximum he could get was $66\frac{1}{3}$ or 66.3 of his average salary for the last five years.

My discussions with Mr. Carder and Mr. Jenkins were had fairly soon after I went to England. They were prior to October 22. (R. p. 25)

I told Mr. Carder and Mr. Jenkins, very plainly, that I wanted to be considered on the same basis as those who were under the superannuation plan—this basis of 2 per cent. (R. p. 25) a year of service. There was discussion of the length of time that they were to consider that I had been in [54] the employ of the company. After some discussion, we decided that I was entitled to service as of June, 1902, when I first started with the Queen City Oil Company. Mr. Carder was quite in agreement.

The witness identified a document shown him as a notification to him, dated October 23, 1931, covering the resolution quoted in the fifth paragraph of the findings of fact, signed by R. A. Carder, Secretary of Anglo-American Oil Company, Ltd., which document was as follows:

“I have to advise you that at a meeting of the directors held on the 22nd instant, the following resolution was passed: ” (Here follows the resolution as quoted in the fifth paragraph of the findings of fact.) (R. pp. 26-28)

(Testimony of Frederick J. Wolfe.)

Thereupon, said document was offered and received in evidence and marked petitioner's Exhibit 1.

During the time that I served as Managing Director and Chairman of Anglo-American Oil Company, Ltd., neither the Standard Oil Company of New Jersey nor the Standard Oil Export Corporation ever dominated the administration policies of the said company. We bought oil and gasoline from sundry people. We bought from Standard Oil of New Jersey; we bought it from outsiders. The administration policies of the company were left entirely and absolutely in the hands of the Board of Directors of Anglo-American Oil Company, Ltd.

The superannuation scheme of Anglo-American Oil Company, Ltd., was not in a very healthy position because of the state of some of its investments. (R. p. 28) From time [55] to time the Board of Directors of Anglo-American Oil Company, Ltd., made very liberal contributions to that fund. (R. pp. 28-29) Those contributions were made to take care of the liabilities they owed to those who were under the plan. They made contributions in excess of what they would have made except for the condition of the fund, the condition of the investments. (R. p. 29)

Prior to August, 1939, I decided to retire from my position with Anglo-American Oil Company, Ltd. I had been advised by my physician on many occasions that England was not a proper climate for

(Testimony of Frederick J. Wolfe.)

me. I was a real sufferer from asthma, and I had been advised by my physician that when the opportune time came I should get out of the country and come to a warmer country, such as California. (R. p. 29)

After making the decision to retire, I had conversations with executives of the Anglo-American Oil Company, Ltd., with respect to my retirement. (R. pp. 29-30) I had several conversations particularly with Mr. Carder.

Mr. Carder, at the time of these conversations, was on the Board of Directors and was Financial Director. One of his functions as Financial Director had all to do with money matters,—with matters pertaining to annuities. He still had, in a way, the accounting, coming through the Secretary-Treasurer. But he was really the financial man on the Anglo-American Oil Company, Ltd., Board. [56]

I told Mr. Carder that I intended to live in the United States. I told him further that when I retired,—and I was planning on retiring,—that I would want my annuity payable to me in American dollars. To that Mr. Carder was quite agreeable. (R. p. 30) We discussed the matter of his purchasing an annuity from an insurance company (R. p. 30) and then he suggested that it might be worked out by Anglo-American Oil Company, Ltd., sending over a certain amount of money to Standard Oil Company of New Jersey, and the latter would pay the annuity.

(Testimony of Frederick J. Wolfe.)

Thereafter I talked the matter over with Mr. Myers.

Mr. Myers at that time,—I think he is still—was associated with the annuities and benefits plan of the Standard Oil Company of New Jersey.

I discussed this matter of the payment in dollars with Mr. Myers. Particularly, he asked me what the rate of exchange was that I wanted and I told him \$5.00 to the pound. To that he was quite in agreement.

Prior to some time in March, I fixed the time of my retirement, I should think March, 1940. The date upon which I had decided I would retire was July 1, 1940. (R. p. 31)

In the last five years of my service with Anglo-American Oil Company, Ltd., my average compensation was eleven thousand pounds (£11,000-0-0) per annum. On the [57] basis of the resolution of October, 1931, I was to be deemed to have been in service since June, 1902. So that on July 1, 1940, I had been in service thirty-eight (38) years. On July 1, 1940, I was sixty (60) years of age. So that at that time the maximum annuity that I could demand was 66.3 per cent. of £11,000, that is £7,293 as I remember. (R. pp. 32-33)

Mr. Myers told me he drew the agreement of March 22, 1940.

The language in the agreement of March 22, 1940, in the first "Whereas" clause, with respect to \$5.00 to the pound, was put into the contract because I decided I was not going to live in England. I did not want pounds; I wanted dollars, and it was

(Testimony of Frederick J. Wolfe.)

agreed that I would receive it in dollars on the basis of what those pounds meant, at \$5.00 to the pound.

I am familiar with the contract of March 22, 1940. (R. p. 33) The facts stated in that contract as statements of fact, other than the ones we have already discussed, are absolutely true. (R. pp. 33-34)

The payments of \$3,038.75 per month to me by Standard Oil Company of New Jersey during the year 1941, which the respondent has admitted were made, were paid to liquidate an obligation that Anglo-American Oil Company, Ltd., had to me. The payments were made pursuant to the contract of March 22, 1940. The first payment of \$3,038.75 was on July 31, 1940. [58] I have received that right up to the present time. (R. p. 34) I have received no amounts from said Standard Oil Company of New Jersey, other than the amounts I have testified to (R. pp. 34-35).

I was never in the employ of the Standard Oil Company of New Jersey. I was never in the employ of Standard Oil Export Corporation.

I was succeeded as Chairman of the Anglo-American Oil Company, Ltd., by Mr. Ed. Soubrey.

Thereupon the following colloquy took place:

By Mr. Wynn:

Q. Mr. Wolfe, I show you a document and ask you what that is?

A. Well, this is a letter from Mr. Soubrey to me.

Q. Dated when?

A. Dated November 19, 1943, advising that the Anglo-American Oil Company——

(Testimony of Frederick J. Wolfe.)

Q. Just a minute. Was this letter written at your request? A. Yes.

Q. How did it come to be written?

A. I asked him for it.

Q. What did you ask him to do?

A. To write a letter saying that the Anglo-American Oil Company acted as my agent. [59]

Q. The point I am making is this, Mr. Wolfe: you asked him for whatever understanding Anglo-American Oil Company may have had in this transaction? A. That is right.

Q. Is that right? A. That is right.

Mr. Wynn: If your Honor please, I offer in evidence a letter dated November 19, 1943, from Mr. Soubrey, chairman of the Anglo-American Oil Company, addressed to Mr. Wolfe.

Mr. Eckman: Your Honor, I object to the introduction of that letter. The letter in part says:

“The Anglo-American Oil Company, Ltd., acted as your agent in this matter and sent 89,120 pounds at your request to the Standard Oil Company of New Jersey.”

That is just a partial quotation.

I object to the letter, first of all, your Honor, because such action must have been the result of formal action by the board of directors of Anglo and the chairman of Anglo, it seems to me, is not qualified to make a formal record of that action.

Secondly, I object to the letter because the words “acted as your agent in this matter” necessarily

(Testimony of Frederick J. Wolfe.)

imply a conclusion of law and not a statement of fact.

It also goes on to say that

“For the purpose of providing a life annuity for you.”

Thirdly, I object to the letter because it was supplied and written at the direct request of the petitioner, after this case had arisen before the Treasury Department.

The Court: Let me see the exhibit.

Have you anything to say?

Mr. Wynn: If your Honor please, I might merely say this: I am offering this to show the letter was [60] written, that certain facts were stated as being the understanding of the chairman of the company.

This company is abroad.

It is not written for the purpose of establishing—I think we have already established the case—it simply was written for the purpose of establishing what the understanding of the then chairman was.

Mr. Eckman: If your Honor please, the signer of the letter was not chairman at the time the events of which he speaks took place.

The Court: Of course, the conclusion as to agency is obviously not proper evidence. I do not think any of this is proper evidence.

Mr. Wynn: Well, if your Honor please, I will withdraw the offer.

(Testimony of Frederick J. Wolfe.)

The Court: Very well. (R. pp. 35-38)

Thereupon a tax return made by the petitioner for the calendar year 1941, which had been certified as correct by the Chief Clerk of the Treasury Department, was admitted in evidence as petitioner's Exhibit 2. In said return, petitioner reported income from "annuities" of \$3,041.51 with the following explanation:

Statement Regarding Annuity Income:

The taxpayer is a citizen of Canada and became a resident of the United States on October 4, 1941. At that time he entered this country on an immigration visa intending to become a resident thereof.

The taxpayer receives an annuity from the Standard Oil Company of New Jersey, the payments being made at the rate of \$3,038.75 per month. The payments received in 1941 during the taxpayer's residence in the United States totaled \$8,822.18. The cash consideration paid to the Standard Oil Company of New Jersey totaled [61] \$415,786.75*. The taxpayer is excluding from his gross income the amount of \$5,780.67, representing the excess of the annuity payments received over three per centum of the principal amount for the period during which the taxpayer was a resident of the United States.

The annuity payments are made pursuant to an agreement between the Anglo-American Oil

(Testimony of Frederick J. Wolfe.)

Company, Limited, the Standard Oil Company of New Jersey, and the taxpayer. A copy of the agreement is attached herewith.

* £87,177 @ 4.68125 = \$408,097.33

£ 1,943 @ 3.9575 = 7,689.42

Total consideration

paid\$415,786.75

On Cross-Examination, the witness, Frederick J. Wolfe, testified:

The stock of the Anglo-American Oil Company, Ltd., was, within one per cent, owned, directly or indirectly, by Standard Oil Company of New Jersey. I suppose you would say said stock was completely owned by Standard Oil Company of New Jersey. At the time I was Chairman, there was a Board of Directors of Anglo-American Oil Company, Ltd. I presume the old Anglo-American Oil Company, which at that time was not owned—stock controlled—by the Standard Oil Company of New Jersey, elected the members of the Board of Directors of Anglo-American Oil Company. I am speaking of when I went there in 1931. (R. p. 39) At the time of my retirement the company was wholly owned by the Standard Oil Company of New Jersey. (R. pp. 39-40) I will say that largely I, myself, elected the Board of Directors of Anglo-American Oil Company, [62] Ltd., at the time of my retirement. I nominated the people for election, and I think in all cases my nominations were agreeable to Standard Oil Company of New Jersey. In other

(Testimony of Frederick J. Wolfe.)

words, Standard Oil Company of New Jersey had the final say as to the members of the Board of Directors. And had Standard Oil disapproved of one of my nominations, I presume it would be one of their prerogatives under the one hundred per cent. ownership of the stock, to have elected anyone else whom they had chosen. (R. p. 40)

I definitely considered that Anglo-American Oil Company, Ltd., had an obligation to make retirement payments of some kind prior to the agreement of March 22, 1940. They were obligated only to pay an annuity based on my services, and in conformity with their scheme. That was their only obligation to me prior to the agreement. (R. p. 41)

I left the employ of Imperial Oil Company and entered the employ of Anglo-American Oil Company, Ltd., because I was asked by Mr. G. Harrison Smith of the Imperial Oil Company to take up this position. If Mr. Walter C. Teagle, President of Standard Oil Company of New Jersey, notified Mr. Smith to ask me, I would say that I got the offer really from Mr. Teagle. But what the conversation was between Mr. Teagle and Mr. Smith I do not know. I would say it was a fair assumption that Mr. Smith asked Mr. Teagle to approach me. It could be, in other words, that realistically speaking, the offer came from Standard [63] Oil Company of New Jersey. At that time I had no understanding as to my retirement pay at the time I entered the employ of Anglo-American Oil Company, Ltd. It is not true that Standard Oil Company of New Jersey guaran-

(Testimony of Frederick J. Wolfe.)

teed the payment of a retirement to me. (R. p. 42)

There was no correspondence or other writing entered into between myself and Anglo-American Oil Company, Ltd., nor Standard Oil Company of New Jersey at the time or just about the time I went to work for Anglo-American Oil Company, Ltd., in 1931. (R. pp. 42-43) I did not ever have any writing to evidence that I was being offered an executive position with Anglo-American Oil Company, Ltd.

Thereupon, the following colloquy took place:

Q. Was there any type of understanding entered into between you and anybody else as to that employment? A. Well——

Mr. Wynn: If your Honor please, I object to the witness stating what his understanding was. It is a conclusion.

Mr. Eckman: I do not believe I was asking for an understanding.

The Court: Read the previous question.

(Question read.)

Mr. Eckman: If I change the word “understanding” to “contract.”

Mr. Wynn: I object to that. He can testify as to what was said. [64]

The Court: Objection overruled.

Mr. Wynn: May I have an exception, your Honor?

The Court: Exception allowed.

(Testimony of Frederick J. Wolfe.)

By Mr. Eckman:

Q. Will you answer the question?

(The previous question was read by the reporter, altered as follows:

“Was there any type of contract entered into between you and anybody else as to that?”)

By Mr. Eckman:

Q. Answer the question, if you can.

A. No, sir. (R. pp. 43-44)

Thereupon, the following colloquy took place:

By Mr. Eckman:

Q. Did you pay any income tax to England or to Canada on the payment of the 89,000 pounds paid by Anglo to Standard?

Mr. Wynn: I object, your Honor.

Mr. Eckman: Your Honor, it shows how the witness considers the money was paid.

Mr. Wynn: It is not a question of what he considered it. It is what it was.

Therefore I urge it is immaterial as to what he did as far as Canadian and English taxes are concerned.

The Court: The objection is overruled. I do not think that is going to help me, but it might, as I see this whole thing.

Mr. Wynn: If your Honor please, I am quite sure that your Honor will give it its proper weight, but for the record, may I have an exception?

The Court: Exception allowed. [65]

(Testimony of Frederick J. Wolfe.)

By Mr. Eckman:

Q. Will you answer the question, please?

A. I did not pay it. (R. pp. 44-45)

Thereupon, the witness continued:

The date of my retirement was set in March, but I decided to retire in August, 1939. (R. p. 45)

Why the payments were made, as the agreement of March 22, 1940, shows, in August and December, 1939, when I did not (R. p. 45) retire until July, 1940, was something over which I had no control. I can only guess. I do not know. (R. p. 46)

Thereupon, the following colloquy took place:

Q. Had Standard withheld any part of the monthly payments to you? A. Yes.

Q. For what purpose?

Mr. Wynn: If your Honor please, I object to this witness being asked what purpose the Standard Oil Company of New Jersey had in that.

The Court: He is one party to this. He may have some knowledge that may be of value. The objection is overruled.

Mr. Wynn: Exception, if your Honor please.

The Court: Exception allowed.

By Mr. Eckman:

Q. For what purpose was the money withheld?

A. They would call it a withholding tax. [66]

Q. A withholding tax?

A. I think that is what they would call it.

Q. When did Standard begin withholding the tax from your pension payments?

A. I suppose when the withholding came into existence as a Government regulation.

(Testimony of Frederick J. Wolfe.)

Q. But you don't know exactly when it was?

A. Not offhand, no. (R. pp. 46-47)

Thereupon, on Redirect Examination, the witness Frederick J. Wolfe, testified:

While I was living in England and an officer of Anglo-American Oil Company, Ltd., I did not prepare my own income tax returns. They were prepared by Mr. Montague Piesse, the solicitor for the Anglo-American Oil Company, Ltd. He knew about the contract of March 22, 1940. I told him about it. (R. pp. 47-48) He did not advise me as to whether or not the pounds paid by Anglo-American Oil Company, Ltd., to Standard Oil Company of New Jersey were taxable to me in England. I did not know anything about that particular phase of the English income tax laws. No tax was withheld by the company. I paid income taxes to England on my salary of eleven thousand pounds (£11,000-0-0) per annum. (R. pp. 48-49)

KENNETH N. RACKLEY

was called as a witness on behalf of the respondent, and being first duly sworn, testified as follows: [67]

On Direct Examination

My occupation is secretary of the annuities and benefits committee of the Standard Oil Company of New Jersey. I have held that position for three and one-half years. Before that time, I was on the staff of the said annuities and benefits committee, but not the secretary. I had been so employed since 1925. (R. pp. 50-51) My job is to administer vari-

(Testimony of Kenneth N. Rackley.)

ous plans of the Standard Oil Company of New Jersey, pension plans and so forth. As a result of my employment, I am familiar with the retirement and pension plans of said company.

Thereupon, the following colloquy took place:

Q. Are you also familiar with the policy of Standard Oil with regard to the retirement of its employees? A. Yes.

Mr. Wynn: If your Honor please, I object. There has been no proof in this record that Mr. Wolfe was ever an employee of the Standard Oil Company of New Jersey, and therefore I think this evidence is not pertinent to the issue before the Court.

He was an employee of the British company.

Mr. Eckman: It has been proved in the record, I believe, that Anglo-American was a wholly-owned subsidiary of Standard, and that Standard was responsible for the election of directors to the Board of Anglo-American.

The Court: I think I can give it such weight as it deserves. Overruled.

Mr. Wynn: Exception. [68]

Q. (By Mr. Eckman): Have you answered the question? Are you also familiar with the policy of Standard with regard to the retirement of its employees? A. Yes. (R. pp. 51-52)

The policy of Standard Oil Company of New Jersey is to retire employees at their own request after they have reached the stipulated age and service and under other circumstances such as length of service and disability and so forth.

(Testimony of Kenneth N. Rackley.)

Thereupon, the following colloquy took place:

Q. Has Standard Oil to your knowledge ever given a retiring employee a lump sum of money in lieu of pension payment?

Mr. Wynn: If your Honor please, I object. In the first place, we concede that Mr. Wolfe was not entitled to any lump sum of money, so that this is not pertinent to the issue before the Court.

In the second place, what Standard Oil may have done to some other employees is not pertinent to the agreement it made with Mr. Wolfe.

The Court: I still think that I can give this testimony such weight as it deserves when I see this entire record.

(The preceding question was read by the reporter as follows:

“Q. Has Standard Oil to your knowledge ever given a retiring employee a lump sum of money in lieu of pension payments?”)

A. It has not.

Q. Has Standard to your knowledge ever given a retiring employee a choice between receiving a lump sum of money? [69]

The Court: I take it you wish the same objection to that line of testimony?

Mr. Wynn: If your Honor please.

The Court: The petitioner will have his exception to this entire line of questioning.

Q. (By Mr. Eckman): Has Standard to your knowledge ever given a retiring employee a choice

(Testimony of Kenneth N. Rackley.)

between receiving a lump sum of money and receiving the payments in the usual manner?

A. No.

Q. Would such a lump sum payment be made in accordance with the policy of Standard?

A. It would not. (R. pp. 52-53)

I understand that Standard Oil Company of New Jersey owns the controlling voting stock of Anglo-American Oil Company, Ltd., but I do not (R. p. 53) know what percentage.

I am familiar with the monthly payments made to Frederick J. Wolfe, the petitioner, by Standard Oil Company of New Jersey. I have the official file of Standard Oil Company of New Jersey relating to the retirement of the petitioner. I can identify that file and its contents as part of the official records of Standard Oil Company of New Jersey. The file that I have is what we know as the employee file of F. J. Wolfe. It is the file of certain records of this employee (R. p. 54), such as we may have had in New York—not the Anglo-American Oil Company's record but such records as we may have in New York. I have examined the file. [70]

The file contains a copy of a letter of August 20, 1931, from Mr. Myers of Standard Oil Company of New Jersey to Mr. Harper of Standard Oil Company of New Jersey. Mr. Myers at the time this letter was written was then secretary of the annuities and benefits committee, the position I now hold. Mr. Harper was, I believe, in charge of foreign sales.

Thereupon, there was read into the record the letter set forth in the fifth paragraph of the findings of fact.

(Testimony of Kenneth N. Rackley.)

Thereupon, the witness continued:

I can identify the handwriting of the penciled notations on the letter just read. Those penciled notations are by the secretary who succeeded Mr. Myers, M. F. Stahl.

Thereupon, said penciled notations as they appear in the fifth paragraph of the findings of fact were read into the record.

The file contains a copy of a letter of June 29, 1939, from F. W. Pierce to Mr. McCobb. Mr. McCobb in 1939 was a director, Mr. Pierce was executive assistant to the President of the company.

Thereupon, a copy of said letter was offered and received in evidence and marked respondent's Exhibit A. Said letter is as follows: [71]

June 29, 1939

Mr. T. C. McCobb,
Building.

Retirement of F. J. Wolfe

Dear Mr. Cobb,

We understand that under the agreement with Mr. Wolfe, he is to receive, upon retirement, a life annuity calculated in accordance with the Anglo Plan and their discount absorption program (the latter being identical to outs), the annuity to be payable in the United States in dollars converted at the rate of \$5.00 to the pound. I give below a state-

(Testimony of Kenneth N. Rackley.)

ment showing the amount of Mr. Wolfe's annuity computed as of five possible retirement dates, in pounds as well as dollars converted at the rate of \$5.00 to the pound and \$4.68 to the pound, the rate prevailing on June 20th:

Assumed Effective Date	Pounds	Annual Annuity	
		Dollars	Dollars
		@ \$5.00	@ \$4.68
1/1/40	£7,095	\$35,475	\$33,204
7/1/40	7,293	35,475	34,131
1/1/41	7,524	37,620	35,212
7/1/41	7,788	38,940	36,447
1/1/42	8,085	40,425	37,837

The procedure which is to be followed in respect of payment and transfer of funds has been discussed with Mr. Wolfe and we find that it presents some problems. However, subject to proper approval, it is proposed that the annuity be paid by New York in dollars, converted at the rate of \$5.00 to the pound. In view of the uncertainties of the future and in order to assure that the necessary funds be available here when needed, it is further proposed that Anglo transfer to S.O.Co. of N.J. for deposit to the sub-account for assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability, assuming retirement as of January 1, 1940, computed on a 3% interest basis and discounted for mortality but not for labor turnover due to any other cause. This transfer would be dollars at the rate of exchange prevailing at the time of payment. If retirement occurs at a later date, Anglo would make the necessary additional capital contribution. In the event of Mr. Wolfe's death

(Testimony of Kenneth N. Rackley.)

prior to retirement, the capital contribution plus 3% interest, computed annually, would be returned to Anglo unless the pension had meanwhile been insured in which event, the premium refund, if any, would be determined in accordance with the [72] provisions of the insurance contract under which it was purchased. Any cost incurred in New York by reason of a sterling rate less than \$5.00 would be absorbed by Jersey and charged to such account as may be later determined. The Anglo sterling pension capital contribution would possibly not be a deductible item for income tax purposes so far as concerns Anglo.

Very truly yours,

/s/ F. W. PIERCE.

There is in the file a letter of August 4, 1939, from Mr. Reginald Carder of Anglo-American Oil Company, Ltd., to Mr. Pierce. I cannot identify Mr. Reginald Carder (R. p. 58).

Thereupon, a copy of said letter containing written notations was offered and received in evidence and marked respondent's Exhibit B (R. pp. 59-60).

Said letter is as follows:

4th August 1939.

Personal and Confidential

Mr. Frank Pierce,
Annuities & Benefits Dept.
30 Rockefeller Plaza,
New York City, U. S. A.

Dear Mr. Pierce,

With regard to the discussions which Mr. Wolfe

(Testimony of Kenneth N. Rackley.)

had during his recent visit to New York as summarized in memorandum dated 29th June 1939 from Mr. J. W. Myers to Mr. T. C. McCobb, as the procedure proposed entails obligations on all three parties affected and is of considerable importance, it seems to us that by far the best method of dealing with the matter is to embody the arrangement in a simple three-party agreement.

Accordingly, such agreement has been drawn up by Mr. Montagu Piesse and is enclosed herewith and we suggest that the Jersey Company should complete [73] this in triplicate, sending all three copies to us for completion by ourselves and Mr. Wolfe, following which one copy would be returned to you.

Our Actuary advises us that the capital liability of the amount of Annuity if payable as from 1st January 1940 works out at £88,049—and the present value of this as at 1st September 1939 is £87,177—. It is this latter amount which should be inserted in the agreement and on completion of the documents we would therefore either hold at your disposal or remit this sum to you.

Should be glad if, when returning the documents referred to, you would be good enough to send them under personal cover addressed to myself.

Yours very truly,

R. A. CARDER.

(Testimony of Kenneth N. Rackley.)

Enclosure.

(Handwritten notations——

$$£87,177 @ 4.68 = 408,988$$

$$£87,177 @ 5.00 = 435,885$$

(Group annuity)

(Limited to 20,000)

Our estimated cost at 3%.....491.000

Without loading451.00

There is in the file a letter bearing in the lower left hand corner the initials F. W. Pierce addressed to R. A. Carder, Anglo-American, 38 Queen Ann's Gate, London S.W.1., England (R. pp. 60-61).

Said letter was thereupon read into the record as follows:

“Dear Mr. Carder:

When I wrote you the other day, I failed to realize that you have a three-corner agreement between Standard Oil of New Jersey and Mr. Wolfe, as [74] a means of insuring that Anglo had discharged its liability for any pension payments to Mr. Wolfe.

This phase of the case has not been adequately considered, and we are now undertaking to get our lawyers to agree to some formal release that will be agreed to before the annuity becomes payable on July the 1st.

You can be sure that this will be advanced as promptly as possible.

No Signature.”

(Testimony of Kenneth N. Rackley.)

Thereupon, the following colloquy took place:

Q. Is there in the file any mention or discussion of paying a lump sum to Mr. Wolfe upon his retirement? A. No.

Mr. Wynn: If your Honor please, I will have to renew my objection to this line of questions that I made a moment ago.

The Court: Objection overruled. Exception allowed.

I want to see what it all means. I do not know what weight to give it—maybe none, maybe much.

Proceed.

(Previous question read.)

A. To the best of my knowledge, there is no such statement in the file. (R. pp. 61-62).

Thereupon, on Cross-Examination, the witness, Kenneth N. Rackley, continued:

I think I only met Mr. Wolfe once until I saw him in the courtroom today. Mr. Wolfe, to my knowledge, has never [75] been an employee of the Standard Oil Company of New Jersey. When I spoke of this file as the employee's file, it was not my intention to characterize him as an employee of Standard Oil Company of New Jersey (R. p. 62).

The file does not contain a copy of a letter dated August 18, 1939, from Mr. Shaw to Mr. Carder (R. pp. 62-63). We do not have stamps in our file similar to the stamp which I see on the letter shown to me (R. p. 63).

(Testimony of Kenneth N. Rackley.)

We call the mimeographed sheets in the file which I have described as the company's file on which annuities of various ages and dates are computed work sheets for that purpose (R. p. 64). The legend on a number of these sheets "Cost to purchase from Equitable" means, if we had a case where we purchased from Equitable, the cost would be in there (R. pp. 64-65). That is not the case in this. In this case, I presume these work sheets were in respect to Mr. Wolfe. I do not know. The initials on the work sheet are F.J.W. I would not assume that these work sheets were not with respect to Mr. Wolfe (R. p. 65).

The file contains a copy of a letter dated June 16, 1939, from J. W. Myers to Mr. F. J. Wolfe.

Thereupon said letter was offered and received in evidence and marked petitioner's Exhibit 3 (R. pp. 65-66). Said letter is as follows. [76]

June 16, 1939.

Personal & Confidential

Mr. F. J. Wolfe,
c/o Mr. G. H. Smith,
56 Church St.,
Toronto 2, Ontario,
Canada.

Dear Mr. Wolfe:

In accordance with your telephone conversation, I enclose memorandum prepared by Mr. Rackley, giving the amount of annuity per thousand pounds of salary for the five indicated dates.

(Testimony of Kenneth N. Rackley.)

Inasmuch as you will have earned your maximum annuity credits by the end of this year, a possible suspension of the present Anglo Plan as of the end of this year would not affect the figures shown in the attached statement. This would be true even if the final 5-year average contained in your present Plan were changed to present salary, as presumably your salary would not change in the event you elected to remain in service for another year or two. It would appear, therefore, that if you should remain in service under the new Plan any annuities of Thrift Plan credits obtained thereunder would be in addition to the amount shown on the attached statement. The problem of paying your annuity in dollars at this end has been left for future consideration.

A copy of this letter and enclosure are being sent to Mr. Pierce.

Sincerely yours,

J. W. MYERS,

JWM/ED

Encl.

cc Mr. F. W. Pierce [77]

(Testimony of Kenneth N. Rackley.)

Memorandum Re F. J. Wolfe

Annual annuity per £1,000 of average annual salary applying:

Anglo discount rates to nearest one-half year of age interpolating where necessary.

U. S. absorption program.

U. S. program for adjusting age for discount purposes by taking into account service in excess of 37½ years.

U. S. program in computing age to nearest one-half year.

Allowing full credit of 2% for each year of service.

	Age for discount			Annual Annuity			
				Assuming Retirement			
Age	purposes	Service	1/1/40	7/1/40	1/1/41	7/1/41	1/1/42
4 m.	60½ y.	37 y. 7 m.	£645	-----	-----	-----	-----
10 m.	61½ y.	38 y. 1 m.	-----	£663	-----	-----	-----
4 m.	62½ y.	38 y. 7 m.	-----	-----	£684	-----	-----
10 m.	63½ y.	39 y. 1 m.	-----	-----	-----	£708	-----
4 m.	64½ y.	39 y. 7 m.	-----	-----	-----	-----	£735

R:HMC 6/16/39

(Testimony of Kenneth N. Rackley.)

The file contains a copy of a memorandum consisting of two sheets, dated June 21, 1939, from myself to Mr. Pierce (R. pp. 66-67).

Thereupon, said memorandum was offered and received in evidence and marked petitioner's Exhibit 4. Said letter is as follows:

MEMORANDUM

June 21, 1939.

Dear Mr. Pierce,

In submitting the attached memorandum in connection with the case of F. J. Wolfe, because of the sizeable amounts involved I think I should ask you whether you are interested in having a similar statement prepared showing the cost of the "excess," that is, the amount over \$20,000 annually, on a refund basis. This type of contract guarantees an annuity for the life of the annuitant and, in addition, provides that if at the death of the annuitant the guaranteed annuity payments made by the insurance company do not equal the consideration paid, the annuity payments will be continued to a beneficiary until the guaranteed return equals the consideration. The original outlay, of course, would be considerably higher, but you might want to consider it particularly if Mr. Wolfe is not in good health. So far as concerns the \$20,000 annual purchase under contract 255, any surplus resulting by death shortly after retirement would be reflected in dividends.

I do not think we should proceed on the definite

(Testimony of Kenneth N. Rackley.)

assumption that the purchase of such a large amount can be made from an insurance company. In so far as the Equitable is concerned, they have indicated that if they were asked to write such a contract at the present time they would have to think over the matter. There is the further point that if we are going the insurance company route you might wish to consider a non-par company, in which event the rates would be slightly less than those used in computing the capital value shown on the attached statement, but there would be no dividends to the annuitant. [79]

If the retirement goes through you might wish to give consideration to having the payments made from New York with a periodic billing to Anglo. It might turn out to be to the Company's benefit to handle the matter under such an arrangement if Mr. Wolfe is in poor health.

K. N. R.

KNR:HMC [80]

Memorandum Re Mr. F. J. Wolfe

Mr. F. W. Pierce:

June 21, 1939

The following is the information you asked me for in connection with the approximate capital value of Mr. Wolfe's annuity, for the various dates and amounts indicated in the attached memorandum of June 16, to Mr. Wolfe:

	Assuming retirement effective			
	1/1/40	7/1/40	1/1/41	7/1/41
Annual annuity in dollars converted on basis of rate of exchange 6/20/39 (\$4.68)	1/1/42			1/1/42
Cost to purchase \$20,000 annually under contract AC-255 (absorption contract)	\$ 33,204	\$ 34,131	\$ 35,212	\$ 36,447
Cost to purchase balance as individual participating life annuity (payments to commence month after purchase)	267,715	263,732	259,749	255,766
—See note	192,745	203,433	215,940	230,175
Total cost	\$460,460	\$467,165	\$475,689	\$485,941
				\$498,124

Note: Under the individual participating life annuity the annuitant would share in any dividends payable by the insurance company. The Equitable advises me that under present conditions the dividend at the end of the first year the contract is in effect would approximate $71\frac{1}{2}\%$ of the annual annuity; at the end of the second year, $8\frac{1}{2}\%$; third year, 8.6% ; fourth year, 8.7% ; and fifth year, 8.8% . To take the dividends into account in fixing the amount of the annuity it would be necessary to reduce the grant by about 7% .

K. N. R.

KNR:HMC

(Testimony of Kenneth N. Rackley.)

The file contains a copy of a letter dated January 9, 1940, from Mr. Pierce to Mr. Carder.

Thereupon, said letter was offered and received in evidence and marked petitioner's Exhibit 5 (R. pp. 67-68). Said letter is as follows.

Jan. 9, 1940.

Personal & Confidential

Mr. R. A. Carder,
Anglo-American Oil Co. Limited,
36 Queen Annes Gate,
London, S.W.1, England.

Dear Mr. Carder:

Final arrangements have been made, satisfactory to Mr. Wolfe, so that his retirement will become effective July 1, 1940. Although our formal setup for taking care of the annuity is not completed, we have undertaken to guarantee Mr. Wolfe that the money which you have provided, plus the additional amounts which Standard Oil Co. of New Jersey will be required to put up, will be used to assure him the annuity to which he is entitled, and there is no reason, therefore, why you should not formally record the transaction.

As suggested in your letter, we will arrange to debit the dollar equivalent of £1071 against any dollar credits which you may have in New York, and the accountants will send through to you the formal record in due course. We have cabled you concern-

(Testimony of Kenneth N. Rackley.)

ing the above, copy of which is attached. Thank you very much for your prompt action in this whole matter.

With best regards,

Yours very truly,

FWP:DA.

Enc.

The file contains a copy of a letter dated March 22, 1940, from Mr. Pierce to Mr. Carder. [82]

It was stipulated that said letter refers to the agreement of March 22, 1940.

Thereupon, said letter with pencil notations thereon was offered and received in evidence and marked petitioner's Exhibit 6 (R. p. 68). Said letter is as follows:

March 22, 1940.

Mr. R. A. Carder,

Anglo-American Oil Company Ltd.,

36 Queen Anne's Gate,

London, S.W.1, England.

Dear Mr. Carder:

Supplementing our letter of January 12th we now enclose three copies of an agreement of annuity settlement of today's date between Anglo, Jersey and Mr. Wolfe. All three copies have been duly executed by Jersey and Mr. Wolfe. We assume you will complete these three documents on behalf

(Testimony of Kenneth N. Rackley.)

of Anglo, retain one copy for your files and one for Mr. Wolfe and return the original to us for filing with the Secretary.

Mr. Wolfe will explain to you why it was necessary from our viewpoint to reword the agreement. We believe, nevertheless, that the revised agreement accomplishes the protection for Anglo which you sought in your draft of the agreement.

We also enclose Mr. Koechling's letter of March 22nd to you and debit memorandum in the amount of £1943 referred to therein. This additional charge of £1943 represents the difference between Anglo's initial contribution of £87,177 and a contribution of £89,120, the latter being the amount agreed upon with retirement effective July 1, 1940. This supplemental payment of £1943 supersedes the payment of £1071, which through inadvertence was mentioned in the second paragraph of our letter to you of January 9th.

Very truly yours,

F. W. PIERCE.

JWM.EB

Encl. [83]

(Pencil notations on foregoing letter:

Noted KNR

Letter released by JWM

C F U P (with 1 agreement)

3/26/40)

7/1/40

Has anyone been told to make payments

KNR

(Testimony of Kenneth N. Rackley.)

The file contains a copy of a letter dated December 11, 1940, from Mr. W. D. Barcus to Mr. R. L. B. Roessle. Mr. Barcus was then on the staff of the Treasurer's Department of Standard Oil Company of New Jersey. Mr. Roessle was in charge of the Overseas Personnel Office of Standard Oil Company of New Jersey.

Thereupon, said letter was offered and received in evidence and marked Petitioner's Exhibit 7 (R. p. 69). Said letter was as follows:

December 11, 1940.

Specimen Signature Card

.

Frederick John Wolfe

Mr. R. L. B. Roessle
Overseas Personnel Office
Building

Dear Sir:

So that our auditors may verify from time to time that Frederick John Wolfe, to whom we pay a special annuity, is alive, we would ask that you kindly secure a specimen of Mr. Wolfe's signature on the attached card and send it to this office. [84]

In view of the fact that the special annuity due Mr. Wolfe is payable to his present wife, Marguerite W. Wolfe, should she survive him, we think it ad-

(Testimony of Kenneth N. Rackley.)

visible to secure a specimen of her signature at this time. A card for this purpose is also attached.

Very truly yours,

TREASURER'S DEPARTMENT.

By W. D. BARCUS.

GG:LS

In dupl.

2 Encls.

The work sheets in the file are in the handwriting of one of the staff of Mr. Myer's office at that time. There are a number of these work sheets in the file, several of them. When a red "X" is over a sheet, that means that the arrangement we were talking about was out. Before the red X's were put on the sheets, they were made for a purpose of determining a figure,—not an actuarial basis (R. p. 70), to determine an amount of an annuity based on a certain set of facts as they appear on that particular work sheet (R. p. 71).

Thereupon, the following colloquy took place:

Q. And the fact is that the particular plan as represented by a particular work sheet was not carried into effect, as indicated by X, is that correct?

A. Oh, probably a different set of facts as we went along—perhaps, let me see if I can tell you what the difference was.

This assumed the date of retirement as September 1, 1940. (Indicating) This assumed the date

(Testimony of Kenneth N. Rackley.)

of retirement would be September 1, 1939, you see, and you would [85] have a different calculation. (Indicating) This one assumed the date of retirement July 1, 1941, and you have a different calculation.

(Indicating) This assumed January 1, 1941.

Apparently they were not sure when they were going to retire the man.

There is another one, July 1, 1940.

Q. All right, now assuming he was going to retire on July 1, 1940, what was the purpose of this work sheet, because that happens to be when he did retire.

Mr. Eckman: Your Honor, I object to the line of questioning concerning these work sheets, because the witness has already testified that this was not the scheme that was used for the retirement of the petitioner.

They were merely, if I may so characterize them, office scratch sheets which happened to be retained in the file, but they are clearly marked as absolutely of no effect whatsoever either in the calculations or in the computations for the subsequent retirement.

Mr. Wynn: If your Honor please, the fact is—that they show exactly how this department was worked before this contract was made, to arrive at the result they finally did arrive at.

The Court: Does it necessarily show that? It shows how they were working before, but how will I know that they did not change their plan in some degree, large or small, before the final result?

In other words, of what value is this to me? I want all the help I can get here, but of what value to me is this preliminary work sheet going to be?

Mr. Wynn: Frankly, your Honor, if I can state for the record my purpose in attempting to put these in, it is primarily to prove that according to these work sheets they did contemplate buying this annuity from an insurance company.

Now, with that explanation in the record I am not going to press the matter any further, because I do not want to consume the time of the Court. But that is my purpose.

The Court: I have the time. I am not pressed for time. [86]

Mr. Wynn: Well, that is my purpose in attempting to get one of these work sheets in as typical of the others, that they indicate that they were at that time contemplating buying his insurance policy—annuity policy from an insurance company.

The Court: Has the witness stated that?

Mr. Wynn: No, he has not stated that except in response to my questions, when I called his attention to the fact that if purchased from Equitable, the cost would be so much.

Mr. Eckman: Your Honor, we have here a written agreement which is already in evidence as part

of the stipulation of facts, which reflects the final method, plan and purpose of the requirement, and all these preliminary negotiations it seems to me are immaterial, besides which, why select two or three work sheets? There were probably any number of schemes that were thought about at one time, and I submit that it will only clutter the record and serve no purpose of help to your Honor, and certainly will not be relevant to the record.

The Court: I do not think that the preliminary work sheets will assist me.

Objection sustained.

Mr. Wynn: All right, I take an exception, your Honor.

The Court: Exception allowed. (R. pp. 71-74).

Thereupon, on Redirect Examination, the witness, Kenneth N. Rackley, testified.

The final annuity computation under which retirement pay was granted to petitioner had nothing to do with petitioner's exhibit 4 (R. pp. 74-75).

GEORGE S. KOCH

was called as a witness on behalf of the respondent, and being first duly sworn, testified as [87] follows on

Direct Examination

I am tax counsel for the Standard Oil Company and a member of the New York Bar. I have been employed as tax counsel for the Standard Oil Company of New Jersey since 1935. My duties, primarily, are to pass on such legal questions which

(Testimony of George S. Koch.)

arise under the various tax laws, Federal and State, which may arise with respect to company matters (R. p. 75).

I am familiar with the retirement payments which are made monthly to the petitioner (R. pp. 75-76). I have had nothing to do with the mechanical payment of the monthly sum to the petitioner, but I have been involved in the questions surrounding its payment, such as income tax matters. I am therefore familiar with the details surrounding the payments.

Thereupon, the following colloquy took place:

Q. Have you ever directed that any sum be withheld from the monthly payments made to Mr. Wolfe by Standard?

Mr. Wynn: Your Honor, I object to it as being immaterial to the issue in this case.

Mr. Eckman: Your Honor, the question bears on the materiality in this respect. Standard Oil is paying money. Standard Oil must account for the money in some manner and must have some intention as to what it is.

The Court: Objection overruled and exception allowed.

Will you read the previous question?

(Question read by the reporter.) [88]

A. I participated in the decision to make such withholdings.

Q. Were such sums withheld?

A. They were.

(Testimony of George S. Koch.)

Q. Why did you direct Standard to withhold those sums?

Mr. Wynn: If your Honor please, we are not interested in the legal opinion. I do not believe this Court needs the benefit of legal opinion. That is one of the questions for you to determine, sir.

The Court: Why are you asking him some legal proposition?

Mr. Eckman: Your Honor, I am not presuming to instruct the Court in matters of law, but I am trying to get the opinion of Standard Oil in withholding this money. Why did they do it? And this witness is qualified to answer the question.

Mr. Wynn: If your Honor please, I do not think that we are at all interested here in what the motives of Standard Oil Company may have been in withholding or not withholding in respect to Mr. Wolfe.

At best it would be no more than the opinion of the executives of Standard Oil, including Mr. Koch, as to what they should do for their own protection. It has nothing to do with the issue before this Court, but it is primarily a matter of opinion.

Mr. Eckman: But, your Honor, in any matter of this kind, where you are dealing with an employer and an employee, you can——

Mr. Wynn: If your Honor please, I object to the characterization of Mr. Wolfe as an employee. That has not been proved.

Mr. Eckman: All right, the employee of a wholly-owned subsidiary, if you like. It is, I submit, the same thing for practical purposes and taxation is a practical matter.

(Testimony of George S. Koch.)

The Court: Let us not get into an argument about that. This gets very close to asking this gentleman to give legal advice, but I can see how the matter of motives of the plan may possibly affect this. The objection is overruled; exception allowed.

Q. (By Mr. Eckman): Why did you direct Standard to withhold those sums?

A. Well, the statute on withholding dealt with the question of wages, and wages only, and the regulations provided that pensions and retirement income were treated as wages.

That was the basis on which the decision was made. (R. pp. 76-78)

Thereupon, on Cross-Examination, the witness, George S. Koch, testified:

I have given my opinion. I have stated why I directed these withholdings. In doing so I have expressed my legal opinion as a lawyer. Assuredly, it was certainly my duty to protect Standard Oil Company of New Jersey. Any doubts would have been resolved in favor of Standard Oil Company of New Jersey (R. p. 79). I don't necessarily believe I had any doubts, at least when the decision was made. Frankly, I have had doubt. I was simply advising my client, my employer, to do whichever way the cat jumped, they were going to be protected (R. p. 80).

Thereupon, the respondent Rested.

Thereupon, the petitioner Closed.

[Endorsed]: Filed Aug. 11, 1947. [90]

[Title of Tax Court and Cause.]

PETITIONER'S DESIGNATION OF THE
PORTIONS OF THE RECORD, PROCEED-
INGS AND EVIDENCE TO BE CON-
TAINED IN THE RECORD ON THE RE-
VIEW BY THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT
OF THE DECISION IN THIS PROCEED-
ING OF THE TAX COURT OF THE
UNITED STATES

To the Clerk of the Tax Court of the United States:

You will please transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit a typewritten copy of the record on the review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision in this proceeding by the Tax Court of the United States. The petitioner hereby designates the portions of the record, proceedings and evidence to be contained in said record on appeal as follows:

1. The docket entries of all proceedings before the Tax Court of the United States.
2. Pleadings before the Tax Court of the United States as follows: [91]
 - (a) The Petition
 - (b) The Answer
3. The statement of evidence, a copy of which is annexed hereto.
4. The findings of fact and opinion of the Tax Court of the United States.

5. The decision of the Tax Court of the United States.

6. The petition for review.

7. Proof of service of the petition for review, with notice thereof, upon the respondent.

8. Petitioner's statement of points, a copy of which is annexed hereto.

9. This the petitioner's designation of the portions of the record, proceedings and evidence to be contained in the record on the review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision in this proceeding by the Tax Court of the United States.

10. Proof of service upon the respondent of this petitioner's designation of the contents of the record, proceedings and evidence to be contained in the record on the review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision in this proceeding of the Tax Court of the United States.

/s/ WILLIAM GALBALLY, JR.,
Attorney for Petitioner.

Personal service of a copy of the foregoing designation is hereby acknowledged this 31st day of July, 1947.

/s/ CHARLES OLIPHANT, CAR
Acting Chief Counsel, Bureau
of Internal Revenue.

[Endorsed]: Filed July 31, 1947. [92]

[Title of Tax Court and Cause.]

CERTIFICATE

I, Robert C. Tracy, acting clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 92, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of August, 1947.

[Seal] /s/ ROBERT C. TRACY,
 EMT

Acting Clerk, The Tax Court
of the United States.

[Endorsed]: No. 11713. United States Circuit Court of Appeals for the Ninth Circuit. Frederick John Wolfe, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed August 25, 1947.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

FREDERICK JOHN WOLFE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

UPON PETITION TO REVIEW A DECISION OF THE TAX COURT
OF THE UNITED STATES

BRIEF FOR PETITIONER

WILLIAM GALBALLY, JR.,
510 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

Of Counsel:

JAMES O. WYNN,
1 East Forty-fourth Street,
New York 17, New York.

FILED
JAN 12 1939
PAUL P. O'BRIEN,
CLERK

SUBJECT INDEX OF THE MATTER IN THE BRIEF

PAGE

Statement of the pleadings and facts disclosing the basis upon which it is contended that The Tax Court of The United States had jurisdiction and that this Court has jurisdiction upon petition to review the decision in question	1
Jurisdiction of The Tax Court of The United States	1
1. The statutory provisions believed to sustain the jurisdiction of The Tax Court of The United States	1
2. The pleading necessary to show the jurisdiction of The Tax Court of The United States....	2
Jurisdiction of this Court	2
1. The statutory provisions believed to sustain the jurisdiction of this Court	2
2. The pleading necessary to show the jurisdiction of this Court	3
Abstract or statement of the case	3
Specification of errors relied upon	19
Specifications of errors relating to the findings of fact	19
1. The Tax Court of The United States erred in failing to find as a fact that the deficiency from the determination of which this appeal was taken to The Tax Court of The United States was based upon a determination of the petitioner's taxable net income for the calendar year 1941, in which computation no part of the annuity paid to the petitioner by Standard was excluded from petitioner's gross income	19
Statement of wherein the findings of fact are, with respect to this the first specification of error, erroneous	19

2. The Tax Court of The United States erred in failing to find as a fact that petitioner did not, prior to March 1, 1931, discuss with any official of Standard or Export the question of his retirement pay in the event of his eventual retirement and that the question of petitioner's retirement pay in the event of his eventual retirement was never, prior to March 1, 1931, mentioned in the conversations between petitioner and officials of Standard and Export in any way, shape or form 19

Statement of wherein the findings of fact are, with respect to this the second specification of error, erroneous 20
3. The Tax Court of The United States erred in failing to find as a fact that the facts stated in the paragraph beginning "Whereas" of the contract between petitioner, Anglo and Standard, set forth in the Eleventh paragraph of the findings of fact (R. pp. 23-24) are true except that there was no understanding with any officer of Standard or of Imperial that if petitioner were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo as in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard at an exchange rate of five dollars to the pound..... 21

Statement of wherein the findings of fact are, with respect to this the third specification of error, erroneous 22
4. The Tax Court of The United States erred in finding as a fact that when the petitioner undertook the assignment of chairman and managing director of Anglo at the request of Standard, it was the understanding that if he

were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo, in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard in dollars at an exchange rate of five dollars to the pound 24

Statement of wherein the findings of fact are, with respect to this the fourth specification of error, erroneous 24

5. The Tax Court of The United States erred in failing to find as a fact that when petitioner went to London in 1931 he was not eligible to participate in the superannuation scheme of Anglo, because the superannuation scheme had been changed to preclude participation by anybody who came into the company after some time in May 1928 25

Statement of wherein the findings of fact are, with respect to this the fifth specification of error, erroneous 26

6. The Tax Court of The United States erred in failing to find as facts that during the time the petitioner served as managing director and chairman of Anglo, neither Standard nor Export ever dominated the administration policies of Anglo; that Anglo bought oil and gasoline from sundry people; that Anglo bought oil and gasoline from Standard and from others; and that the administration policies of Anglo were left entirely and absolutely in the hands of the board of directors of Anglo 26

Statement of wherein the findings of fact are, with respect to this the sixth specification of error, erroneous 26

7. The Tax Court of The United States erred in failing to find as a fact that the superannua-

tion scheme of Anglo was not in a very healthy position because of the state of some of its investments, and that from time to time the board of directors of Anglo made very liberal contributions to the superannuation fund to take care of the liabilities Anglo owed to those who were under the plan	27
Statement of wherein the findings of fact are, with respect to this the seventh specification of error, erroneous.....	27
8. The Tax Court of The United States erred in failing to find as a fact that the petitioner wanted an annuity payable in dollars because he had been advised by his physician on many occasions that England was not a proper climate for him and he intended to go to The United States upon his retirement.....	28
Statement of wherein the findings of fact are, with respect to this the eighth specification of error, erroneous.....	28
9. The Tax Court of The United States erred in failing to find as a fact that in 1939 the financial director of Anglo suggested that the problem of petitioner's annuity might be worked out by Anglo sending over a certain amount of money to Standard and that the latter would pay the annuity	29
Statement of wherein the findings of fact are, with respect to this the ninth specification of error, erroneous.....	29
10. The Tax Court of The United States erred in failing to find as a fact that pursuant to the resolution of the board of directors of Anglo, dated October 22, 1931, Anglo was obligated to pay petitioner a pension upon retirement of the sum of £7,293 per annum.....	30

Statement of wherein the findings of fact are, with respect to this the tenth specification of error, erroneous.....	30
11. The Tax Court of The United States erred in failing to find as a fact that the petitioner was never in the employ of Standard or of Export	31
Statement of wherein the findings of fact are, with respect to this the eleventh specification of error, erroneous	31
12. The Tax Court of The United States erred in failing to find as a fact that petitioner considered that Anglo had an obligation to make retirement payments of some kind to him prior to the agreement of March 22, 1940; that Anglo was obligated only to pay an annuity based on petitioner's services and in accordance with Anglo's scheme of superannuation; and that that was Anglo's only obligation to the petitioner prior to the agreement of March 22, 1940	32
Statement of wherein the findings of fact are, with respect to this the twelfth specification of error, erroneous.....	32
13. The Tax Court of The United States erred in failing to find as a fact that at the time the petitioner became an employee of Anglo there was no correspondence or other writing entered into between himself and Anglo and Standard; that petitioner did not ever have any writing to evidence that he was being offered an executive position with Anglo; and that there was no type of contract entered into between petitioner and anybody else as to his employment by Anglo.....	33
Statement of wherein the findings of fact are, with respect to this the thirteenth specification of error, erroneous.....	33

14. The Tax Court of The United States erred in finding as a fact that petitioner paid no income tax to England or Canada on the payments made by Anglo to Standard..... 34
- Statement of wherein the findings of fact are, with respect to this the fourteenth specification of error, erroneous..... 34
15. In the alternative, if it should be held that The Tax Court of The United States did not err as alleged in specification of error 14—The Tax Court of The United States erred in failing to find as facts that while petitioner was living in England and an officer of Anglo he did not prepare his own income tax returns; that his income tax returns were prepared by the solicitor for Anglo; that the solicitor for Anglo knew about the contract of March 22, 1940; that petitioner had told said solicitor about that contract; that said solicitor did not advise petitioner as to whether or not the pounds paid by Anglo to Standard were taxable to petitioner in England; that petitioner did not know anything about that particular phase (that is the question of whether or not the pounds paid by Anglo to Standard were taxable to him in England) of the English income tax law; that no tax was withheld on the £89,120 paid by Anglo to Standard; and that petitioner paid income taxes to England on his salary of £11,000 per year received from Anglo..... 34
- Statement of wherein the findings of fact are, with respect to this the fifteenth specification of error, erroneous..... 35
16. The Tax Court of The United States erred in finding as a fact that Standard has withheld income tax from the monthly payments made by Standard to the petitioner..... 35

Statement of wherein the findings of fact are, with respect to this the sixteenth specification of error, erroneous..... 36

17. In the alternative, if it should be held that The Tax Court of The United States did not err as alleged in specification of error 16—then The Tax Court of The United States erred in failing to find as facts that the witness, George S. Koch, tax counsel for Standard, in directing Standard to withhold from the sums paid by Standard to petitioner gave his opinion; that in doing so he expressed his legal opinion as a lawyer; that it was his duty to protect Standard; that any doubts would have been resolved in favor of Standard; that while at the time the decision was made, he did not have any doubts, he has since had doubts; and that he was simply advising his client, his employer, to do whatever would protect Standard most regardless of the effect upon petitioner..... 36

Statement of wherein the findings of fact are, with respect to this the seventeenth specification of error, erroneous..... 37

18. The Tax Court of The United States erred in failing to find as a fact that on January 12, 1940, an executive of Standard wrote an executive of Anglo as follows:

“When I wrote you the other day, I failed to realize that you have a three-corner agreement between Standard Oil of New Jersey and Mr. Wolfe, as a means of insuring that Anglo had discharged its liability for any pension payments to Mr. Wolfe.

“This phase of the case has not been adequately considered, and we are now undertaking to get our lawyers to agree to some formal release that will be agreed to before the annuity becomes payable on July the 1st.

	PAGE
“You can be sure that this will be advanced as promptly as possible.”	38
Statement of wherein the findings of fact are, with respect to this the eighteenth specification of error, erroneous	38
19. The Tax Court of The United States erred in failing to find as facts the existence of the documents set forth on pages 90 to 93, both inclusive, pages 95 and 96, and pages 97 and 98 of the Record	39
Statement of wherein the findings of fact are, with respect to this the nineteenth specification of error, erroneous	39
20. The Tax Court of The United States erred in finding as a fact that petitioner had no control over the payment of the £89,120 by Anglo to Standard in 1939	40
Statement of wherein the findings of fact are, with respect to this the twentieth specification of error, erroneous	40
Specifications of errors relating to the admission of evidence	40
21. The Tax Court of The United States erred in receiving in evidence testimony to the effect that the petitioner did not pay a tax to England or Canada on the £89,120 paid by Anglo to Standard	40
Quotation of the grounds urged at the trial for the objection	40
The full substance of the evidence admitted	41
22. The Tax Court of The United States erred in admitting to evidence testimony from the petitioner as to the purpose of Standard in withholding a part of the monthly payments made to the petitioner	41

Quotation of the grounds urged at the trial for the objection.....	41
The full substance of the evidence admitted	41
23. The Tax Court of The United States erred in admitting the testimony of the witness, Ken- neth N. Rackley, to the effect that he was familiar with the policy of Standard with re- gard to the retirement of its employees.....	41
Quotation of the grounds urged at the trial for the objection.....	42
The full substance of the evidence admitted	42
24. The Tax Court of The United States erred in admitting the testimony of the witness, Ken- neth N. Rackley, to the effect that Standard has never given a retiring employee a lump sum of money in lieu of pension payments; that Standard has never given a retiring em- ployee a choice between receiving a lump sum of money and receiving the payments in the usual manner; and that such a lump sum pay- ment would not be in accordance with the policy of Standard	42
Quotation of the grounds urged at the trial for the objection.....	42
The full substance of the evidence admitted	42
25. The Tax Court of The United States erred in admitting to evidence testimony of the wit- ness, Kenneth N. Rackley, to the effect that the file of Standard contains no mention or discussion of paying a lump sum to the peti- tioner upon his retirement	43
Quotation of the grounds urged at the trial for the objection.....	43
The full substance of the evidence admitted	43

26. The Tax Court of The United States erred in admitting in evidence the testimony of the witness, George S. Koch, to the effect that he participated in the decision to make withholdings from the monthly payments made by Standard to the petitioner; that such sums were withheld; and in admitting evidence as to why the witness, George S. Koch, directed Standard to withhold such sums.....	43
Quotation of the grounds urged at the trial for the objection.....	43
The full substance of the evidence admitted.....	44
Specifications of errors not relating to the findings of fact and not relating to the admission of evidence.....	44
Summary of the argument of the case.....	45
The argument of the case.....	46
Introduction	46
I. In the taxable year 1941 an amount was received as an annuity under an annuity contract.....	47
In the taxable year 1941 an amount was received	47
The amount so received was received as an annuity under an annuity contract.....	47
The agreement under which the amounts were received is within every legal and commonly accepted meaning of the term.....	47
The reasoning of the Court below.....	51
The fact that the contract of March 22, 1940 was not a commercial annuity contract is immaterial.....	52
The reasoning of the Court below that the amounts received by the petitioner from Standard were received as a pension and not as an annuity, is unsound.....	52
Hooker v. Hoey (27 Fed. Supp. 489, aff'd 107 F. (2d) 1016) is not a precedent for a decision adverse to the petitioner.....	62

II. A premium or consideration of \$415,786.75 was paid for such annuity.....	63
Conclusion	67
Appendix	68

Table of Cases

Beattie v. Commissioner of Internal Revenue (6 T. C. 609, aff'd 159 F. (2d) 788).....	52
Bodine v. Commissioner of Internal Revenue, 103 App. (2d) 982	52
Bleecker: Terminello v. (155 Misc. 702).....	59
Bogdanoff: Union Properties v. (250 App. Div. 282)....	59
Brodie v. Commissioner of Internal Revenue (1. T. C. 275)	56, 64, 66
Brody & Sons: Witschard v. (257 N. Y. 97).....	59
Bulkley v. Shaw (289 N. Y. 133).....	59
Chisholm v. Shields (67 Ohio State 374, 66 N. E. 93, 94)...	51
Commissioner of Internal Revenue: Beattie v. (6 T. C. 609; aff'd 159 F. (2d) 788).....	52
Commissioner of Internal Revenue: Bodine v. (103 App. (2d) 982)	52
Commissioner of Internal Revenue: Brodie v. (1 T. C. 275)	56, 64, 66
Commissioner of Internal Revenue: Danforth v. (18 B. T. A. 1221)	64
Commissioner of Internal Revenue: Freeman v. (4 T. C. 582)	57, 65
Commissioner of Internal Revenue: Gillespie v. (128 F. (2d) 140)	52
Commissioner of Internal Revenue: Hackett v. (5 T. C. 1325, aff'd 159 F. (2d) 121).....	65
Commissioner of Internal Revenue: Hubbell v. (150 F. (2d) 516, aff'g 3 T. C. 626).....	65
Commissioner of Internal Revenue: Jones v. (2 T. C. 924)	66
Commissioner of Internal Revenue: Oberwinder v. (147 F. (2d) 255, aff'g T. C. Memo. April 26, 1944).....	65

Commissioner of Internal Revenue: Raymond v. (114 F. (2d) 140)	52
Commissioner of Internal Revenue: Ward v. (159 F. (2d) 502, aff'g T. C. Memo. November 29, 1945)	65
Danforth v. Commissioner of Internal Revenue, 18 B. T. A. 1221	64
Freeman v. Commissioner of Internal Revenue (4 T. C. 582)	57, 65
Gillespie v. Commissioner of Internal Revenue (128 F. (2d) 140)	52
Hackett v. Commissioner of Internal Revenue (5 T. C. 1325, aff'd 159 F. (2d) 121)	65
Hoey: Hooker v. (27 Fed. Supp. 489, aff'd 107 F. (2d) 1016)	45, 62, 63
Hooker v. Hoey (27 Fed. Supp. 489, aff'd 107 F. (2d) 1016)	45, 62, 63
Hubbell v. Commissioner of Internal Revenue (150 F. (2d) 516, aff'g 3 T. C. 626)	65
Jones v. Commissioner of Internal Revenue (2 T. C. 924)	66
Kinney: Peck v. (143 Fed. 76, 80)	51
Oberwinder v. Commissioner of Internal Revenue (147 F. (2d) 255, aff'g T. C. Memo. April 26, 1944)	65
Peck v. Kinney (143 Fed. 76, 80)	51
Raymond v. Commissioner of Internal Revenue (114 F. (2d) 140)	52
Rosenkranz v. Schreiber Brewing Co. (287 N. Y. 322)	59
Schreiber Brewing Co.: Rosenkranz v. (287 N. Y. 322)	59
Shaw: Bulkley v. (289 N. Y. 133)	59
Shields: Chisholm v. (67 Ohio State 374, 66 N. E. 93, 94)	51
Terminello v. Bleecker (155 Misc. 702)	59
Union Properties v. Bogdanoff (250 App. Div. 282)	59
Ward v. Commissioner of Internal Revenue (159 F. (2d) 502, aff'g T. C. Memo. November 29, 1945)	65
Witschard v. Brody & Sons (257 N. Y. 97)	59

Table of Statutes

PAGE

Insurance law of the State of New York

Section 46	48
------------------	----

Internal Revenue Code

Chapter 1	2, 46, 68
Section 22 (b)	46, 64
Section 22 (b) (2)	46, 49, 57, 63, 64, 65, 68
Section 272 (a) (1)	1
Section 1101	2
Section 1141	2
Section 1142	2

Personal Property Law of the State of New York

Section 31	59
------------------	----

Revenue Act of 1942

Section 504 (a)	2
-----------------------	---

56 Stat. 957

Title V, Ch. 619, Sec. 504 (a)	2
--------------------------------------	---

United States Code

Title 26

Chapter 1	2, 46, 68
Section 22 (b)	46, 64
Section 22 (b) (2)	46, 49, 57, 63, 64, 65, 68
Section 272 (a) (1)	1
Section 1101	2
Section 1141	2
Section 1142	2

Table of Treasury Regulations and Rulings

	PAGE
Regulation 111	
Section 29.22 (b)(2)-2	49
Solicitor's Opinion 160 (C. B. III-2, 60).....	50

Table of Textbooks

Bouvier's Law Dictionary	
Nalle 3rd Revision 201.....	50
Coke's Littleton	
Section 144 (b).....	50
Corpus Juris	
3rd Edition, page 200.....	51
Kent's Commentaries	
14th Edition, Part VI, page 460.....	50

No. 11713

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

FREDERICK JOHN WOLFE,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

UPON PETITION TO REVIEW A DECISION OF THE TAX COURT
OF THE UNITED STATES

BRIEF FOR PETITIONER

**STATEMENT OF THE PLEADINGS AND FACTS DIS-
CLOSING THE BASIS UPON WHICH IT IS CONTENDED
THAT THE TAX COURT OF THE UNITED STATES HAD
JURISDICTION AND THAT THIS COURT HAS JURIS-
DICTION UPON PETITION TO REVIEW THE DECISION
IN QUESTION**

Jurisdiction of The Tax Court of The United States

1. *The statutory provisions believed to sustain the jurisdiction of The Tax Court of The United States. The statutory provisions believed to sustain the jurisdiction of The Tax Court of The United States are sections 272 (a)(1)*

and 1101 of the Internal Revenue Code¹ (Title 26, United States Code). Prior to December 11, 1944, the respondent determined that there was a deficiency in respect of the tax imposed by Chapter 1 of the Internal Revenue Code (Title 26, United States Code) and on December 11, 1944, he sent notice (R. pp. 9-12) of such deficiency to the petitioner by registered mail. Within ninety days after such notice was mailed, on March 5, 1945 (R. p. 2), the petitioner filed a petition (R. pp. 4-8) with The Tax Court of The United States² for a redetermination of the deficiency.

2. *The pleading necessary to show the jurisdiction of The Tax Court of The United States.* The pleading necessary to show the jurisdiction of The Tax Court of The United States is the petition (R. pp. 4-12).

Jurisdiction of This Court

1. *The statutory provisions believed to sustain the jurisdiction of this Court.* The statutory provisions believed to sustain the jurisdiction of this Court are sections 1141 and 1142 of the Internal Revenue Code³ (Title 26 of the United States Code). The decision of The Tax Court of The United States was rendered, after February 26, 1926 and after June 6, 1932, on April 1, 1947 (R. p. 40). The office of the collector of internal revenue to which was made the return of the tax in respect of which the liability arises was the Office of the Collector of Internal Revenue for the Sixth District of California (R. pp. 4, 12, 16). Said Collector's office is located in the Ninth Judicial Circuit of

¹ The Tax Court of The United States is referred to in the sections cited as "The Board of Tax Appeals". The name was changed by section 504 (a) of the Revenue Act of 1942 (Section 504 (a), Ch. 619, Title V, 56 Stat. 957).

² *Ibid.*

³ *Ibid.*

The United States. Within three months after the said decision was rendered, on June 25, 1947 (R. p. 3), petitioner filed a petition for the review of said decision by this Court.

2. *The pleading necessary to show the jurisdiction of this Court.* The pleading necessary to show the jurisdiction of this Court is the petition for review of decision of The Tax Court of The United States (R. pp. 41-45).

ABSTRACT OR STATEMENT OF THE CASE

(Hereinafter, in this brief for the petitioner, Imperial Oil Co., Ltd., a Canadian corporation (R. pp. 16, 19) will be referred to as "Imperial", Standard Oil Company of New Jersey will be referred to as "Standard", Standard Oil Export Company will be referred to as "Export", and Anglo-American Oil Co., Ltd., an English corporation (R. pp. 5, 13, 16) will be referred to as "Anglo".)

Petitioner is an individual (R. pp. 4, 5, 12, 13, 16), citizen of Canada (R. pp. 5, 13, 16). Petitioner has never been in the employ of Standard (R. pp. 68, 86) or Export (R. p. 68). From the time of his birth in 1879 and until 1931 petitioner was a resident of Canada (R. p. 16).

In June, 1902, petitioner entered the employ of Queen City Oil Co., Ltd. (R. pp. 16, 19, 29, 59, 64), a Canadian corporation (R. pp. 16, 59), which was, in 1911 or 1912, absorbed by Imperial (R. pp. 16, 19, 29, 59). Imperial was largely owned by Standard (R. pp. 29, 59, 60). Petitioner continued in the employ of Imperial until March 1, 1931 (R. pp. 16, 59), at which time he was Vice-President and a member of the Board of Directors (R. p. 59).

Two or three months prior to March 1, 1931, petitioner was requested by Mr. G. Harrison Smith, the Senior Vice-President of Imperial, to go to England and take over the

duties of Managing Director of Anglo (R. pp. 16, 60, 73). Petitioner and Mr. Smith discussed the salary petitioner was to receive (R. pp. 17, 60-61). Petitioner told Mr. Smith he would go to England (R. p. 60).

Thereafter, and prior to March 1, 1931, petitioner had conversations with officials of both Standard (R. pp. 17, 60) (which controlled the stock of Export (R. p. 60)), and Export (R. pp. 17, 60) (which controlled the stock of Anglo (R. p. 60)). These conversations were had so that petitioner might obtain knowledge of the background of Anglo (R. pp. 17, 60).

In none of petitioner's conversations, referred to in the two paragraphs immediately preceding, with officers of Imperial, Standard, and Export, was the question of petitioner's retirement pay in the event of his eventual retirement discussed. It was not mentioned in any way, shape or form (R. p. 61). Standard did not guarantee the payment of retirement pay to petitioner (R. pp. 73-74). Petitioner had nothing in writing to evidence the fact that he was being offered the position with Anglo and he never did have a written contract of employment (R. pp. 74-75).

While, as stated in the next preceding paragraph, petitioner did not discuss with anyone the matter of his retirement pay in the event of his eventual retirement, he knew that Anglo had a scheme or plan in existence for paying its retired employees. Petitioner did not know much about the actual details of the plan, but he knew that the basis of the plan was that an employee was entitled on retirement to roughly 2 per cent per year of service, based on a maximum of 75 per cent, and the average of the last 5 years' pay. Retirement at 60 for one who had the full 37½ years of service would be about 66.3 per cent (R. p. 17). Petitioner understood that he would be entitled to the benefits of this

plan as an officer of Anglo, but this understanding of his was not based on any discussion of the matter with any officer of Imperial, Standard, or Export (R. p. 61).

On March 1, 1931, petitioner went to England (R. p. 59) and became Managing Director of Anglo (R. pp. 5, 13, 16, 23, 59, 73). In an English company the duties of a managing director are similar to those of an executive vice-president of an American corporation (R. p. 62). On July 1, 1931, petitioner also became Chairman of Anglo (R. pp. 5, 13, 16, 61). In an English company the duties of a chairman are similar to those of the president of an American corporation. Anglo had no president (R. pp. 61-62).

As heretofore stated, petitioner had assumed when he went to England that he would be entitled to the benefits of Anglo's superannuation scheme, which he knew to be in existence and the general basis of which he understood. After he arrived in England, he discovered that he was not eligible to participate in that plan because that plan required that an employee, to participate, must have been in the employ of Anglo in May, 1928. Furthermore, petitioner discovered that the funds of Anglo's superannuation plan were invested in stocks which he did not consider to be proper investments. The fund was not in a very sound financial condition (R. pp. 63, 65).

As a result of these discoveries, after March 1, 1931 and prior to October 22, 1931, petitioner discussed with other executives of Anglo the question of payments to be made to him in the event of his retirement from the services of Anglo (R. pp. 17, 29, 62, 64). Petitioner told these executives very plainly that he wanted to be considered on the same basis as those who were under the superannuation plan (R. pp. 17, 64). Petitioner also had a conference with certain officers of Standard. At this conference it was de-

cided that "this question is to be deferred until the Anglo-American Oil Company has revised its annuity plan". It was recognized at the conference with Standard that if the proposed revision of Anglo's plan did not "fully take care of Mr. Wolfe's case", "the matter will have to be given special consideration at the proper time" (R. pp. 18, 80-81).

In the negotiations between petitioner and other executives of Anglo, referred to in the preceding paragraph, but not in the negotiations with officers of Standard, there was also discussion of the length of time that Anglo was to consider that petitioner had been in its employ (R. p. 64). As a result of these discussions, it was decided that petitioner was to be treated as if he had been in the employ of Anglo from the date in June, 1902 when he entered the employ of the Queen City Oil Co., Ltd. (R. pp. 19, 64).

On October 22, 1931 the Board of Directors of Anglo adopted a resolution to dispose of both of the questions which had been raised by petitioner—namely, the question of whether petitioner would be considered on the same basis as those who were entitled to the benefits of Anglo's superannuation plan and the question of the length of time Anglo was to consider that petitioner had been in its employ. Said resolution was as follows:

"Resolved, it being part of the arrangement with Mr. Wolfe on his joining the Board of this Company, and becoming Managing Director, that for the purpose of calculating pension payable by this Company to him, his services shall be deemed to commence from June, 1902, on which date he joined the Queen City Oil Co., Ltd. (which was subsequently absorbed by the Imperial Co., Ltd., of Canada), and that he be entitled to pension on the same basis as employees benefiting under the Company's Superannuation Scheme dated 31st December, 1925, or any subsequent modification thereof." (R. pp. 19, 64, 67).

On October 23, 1931 petitioner was formally advised of the adoption of said resolution by the Secretary of Anglo (R. p. 64).

Petitioner suffered from asthma. He had been advised by his physician on many occasions that England was not a proper climate for him and that when the opportune time came he should get out of England and go to a warmer country, such as California (R. pp. 65-66).

In 1939, petitioner began discussing the possibility of his retirement with the financial director of Anglo, a Mr. Carder. Petitioner told Mr. Carder that he intended, after his retirement, to live in the United States and that he would want his annuity payable to him in dollars. To that Mr. Carder was agreeable. They discussed the possibility of purchasing an annuity for the petitioner from an insurance company (R. p. 66).

Mr. Carder suggested that a solution to the problem might be for Anglo to pay a certain amount of money to Standard, the latter to pay the annuity (R. p. 66). Petitioner then discussed the matters he had discussed with Mr. Carder with an official of Standard (R. p. 67).

In the negotiations with Standard, various proposals were made and disposed of as follows:

1. *With respect to petitioner's proposal that the annuity be payable in dollars.* In petitioner's discussions with an officer of Standard, the latter particularly asked petitioner what the rate of exchange was that he wanted and petitioner told him \$5.00 to the pound. To that the officer was in agreement (R. p. 67). However, on June 16, 1939, the same officer of Standard addressed a letter to petitioner in Toronto, Canada, in which he said:

“ . . . The problem of paying your annuity in dollars at this end has been left for future consideration.”
(R. pp. 87-88).

A memorandum accompanying said letter gave "the amount of annuity" due petitioner, assuming his retirement on various dates, in pounds, not in dollars (R. p. 89). In a memorandum dated June 21, 1939, prepared by an employee of Standard, the annuity due petitioner, assuming retirement on various dates, was shown in dollars, converted at \$4.68 to the pound (R. p. 92). In a memorandum from one executive of Standard to another dated June 29, 1939, it was stated:

"We *understand* (italics supplied) that under the agreement with Mr. Wolfe, he is to receive upon retirement, a life annuity . . . payable in the United States in dollars converted at the rate of \$5.00 to the pound." (R. p. 20).

The memorandum then proceeded to show the amount of the "annuity" due petitioner, assuming retirement on various dates, payable in dollars, converted both at \$5.00 to the pound and at \$4.68 to the pound (R. pp. 81-82). The memorandum then proceeded:

" . . . *subject to proper approval, it is proposed* (italics supplied) that the annuity be paid by New York in dollars, converted at the rate of \$5.00 to the pound. . . . Any cost incurred in New York by reason of a sterling rate less than \$5.00 would be absorbed by Jersey and charged to such account as may be later determined." (R. pp. 20-21, 81-83).

As will be hereinafter pointed out, the agreement eventually made provided that petitioner's annuity be paid to him in dollars and at \$5.00 to the pound.

2. *The proposal that an annuity be purchased for petitioner from an insurance company.* On June 21, 1939, an employee of Standard submitted a memorandum to an executive of Standard reading as follows:

"In submitting the attached memorandum in connection with the case of F. J. Wolfe, because of the

sizeable amounts involved I think I should ask you whether you are interested in having a similar statement prepared showing the cost of the 'excess,' that is, the amount over \$20,000 annually, on a refund basis. This type of contract guarantees an annuity for the life of the annuitant and, in addition, provides that if at the death of the annuitant the guaranteed annuity payments made by the insurance company do not equal the consideration paid, the annuity payments will be continued to a beneficiary until the guaranteed return equals the consideration. The original outlay, of course, would be considerably higher, but you might want to consider it particularly if Mr. Wolfe is not in good health. So far as concerns the \$20,000 annual purchase under contract 255, any surplus resulting by death shortly after retirement would be reflected in dividends.

I do not think we should proceed on the definite assumption that the purchase of such a large amount can be made from an insurance company. In so far as the Equitable is concerned, they have indicated that if they were asked to write such a contract at the present time they would have to think over the matter. There is the further point that if we are going the insurance company route you might wish to consider a non-par company, in which event the rates would be slightly less than those used in computing the capital value shown on the attached statement, but there would be no dividends to the annuitant.

If the retirement goes through you might wish to give consideration to having the payments made from New York with a periodic billing to Anglo. It might turn out to be to the Company's benefit to handle the matter under such an arrangement if Mr. Wolfe is in poor health.

K. N. R.

KNR:HMC

Memorandum Re Mr. F. J. Wolfe

Mr. F. W. Pierce:

June 21, 1939

The following is the information you asked me for in connection with the approximate capital value of Mr. Wolfe's annuity, for the various dates and amounts indicated in the attached memorandum of June 16, to Mr. Wolfe:

	Assuming retirement effective				
	1/1/40	7/1/40	1/1/41	7/1/41	1/1/42
Annual annuity in dollars converted on basis of rate of exchange 6/20/39 (\$4.68)					
Cost to purchase \$20,000 annually under contract AC-255 (absorption contract) . .	\$ 33,204	\$ 34,131	\$ 35,212	\$ 36,447	\$ 37,837
Cost to purchase balance as individual participating life annuity (payments to commence month after purchase) — See note	267,715	263,732	259,749	255,766	251,783
	<u>192,745</u>	<u>203,433</u>	<u>215,940</u>	<u>230,175</u>	<u>246,341</u>
Total cost	\$460,460	\$467,165	\$475,689	\$485,941	\$498,124

Note: Under the individual participating life annuity the annuitant would share in any dividends payable by the insurance company. The Equitable advises me that under present conditions the dividend at the end of the first year the contract is in effect would approximate 7½% of the annual annuity; at the end of the second year, 8½%; third year, 8.6%; fourth year, 8.7%; and fifth year, 8.8%. To take the dividends into account in fixing the amount of the annuity it would be necessary to reduce the grant by about 7%.

K. N. R.

KNR:HMC" (R. pp. 90-93.)

In a memorandum dated June 29, 1939, from one executive of Standard to another, it was said:

“ . . . subject to proper approval, it is proposed . . . In the event of Mr. Wolfe's death prior to retirement, the capital contribution * plus 3% interest, computed annually, would be returned to Anglo *unless the pension had meanwhile been insured* in which event, the premium refund, if any, would be determined in accordance with the provisions of the insurance contract under which it was purchased. . . . ”
(R. pp. 20-21, 81-83.) (Italics supplied.)

The proposal to purchase an annuity for petitioner from a commercial insurance company was never put into effect (R. p. 19).

3. *Mr. Carder's proposal that Anglo pay Standard a sum certain and that Standard pay the annuity to petitioner.* As heretofore pointed out, petitioner's negotiations with Standard were the result of a suggestion by Mr. Carder, the financial director of Anglo, that the problem of petitioner's annuity might be solved by an arrangement whereby Anglo would pay Standard a certain sum of money and Standard would pay the annuity. (See page 7 herein, and R. pp. 66-67.) That this proposal did not meet with immediate acceptance by Standard is indicated by the fact that on June 21, 1939, in a memorandum from an employee of Standard to an executive of Standard, it was stated:

“If the retirement goes through you might wish to give consideration to having the payments made from New York with a periodic billing to Anglo. It might turn out to be to the Company's benefit to handle the matter under such an arrangement if Mr. Wolfe is in poor health.” (R. p. 91).

* The amount to be transferred by Anglo to Standard.

However, on June 29, 1939, an executive of Standard wrote another executive of Standard as follows:

“ . . . subject to proper approval, it is proposed that . . . In view of the uncertainties of the future and in order to assure that the necessary funds be available here when needed, . . . Anglo transfer to S. O. Co. of N. J. for deposit to the sub-account for assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability, assuming retirement as of January 1, 1940, computed on a 3% interest basis and discounted for mortality but not for labor turnover due to any other cause. This transfer would be dollars at the rate of exchange prevailing at the time of payment. If retirement occurs at a later date, Anglo would make the necessary additional capital contribution. In the event of Mr. Wolfe's death prior to retirement, the capital contribution plus 3% interest, computed annually, would be returned to Anglo unless the pension had meanwhile been insured in which event, the premium refund, if any, would be determined in accordance with the provisions of the insurance contract under which it was purchased. Any cost incurred in New York by reason of a sterling rate less than \$5.00 would be absorbed by Jersey and charged to such account as may be later determined. . . . ” (R. pp. 20-21, 82-83).

On August 4, 1939, Mr. Carder, the financial director of Anglo, who had originally suggested the arrangement by which Anglo was to pay a sum certain to Standard and Standard was to pay an annuity to petitioner, wrote an official of Standard as follows:

“With regard to the discussions which Mr. Wolfe had during his recent visit to New York, as summarized in memorandum dated 29th June 1939 from Mr. J. W. Myers to Mr. T. C. McCobb, as the pro-

cedure proposed entails obligations on all three parties affected and is of considerable importance, it seems to us that by far the best method of dealing with the matter is to embody the arrangement in a simple three-party agreement.

“Accordingly, such agreement has been drawn up by Mr. Montagu Piesse and is enclosed herewith and we suggest that the Jersey company should complete this in triplicate, sending all three copies to us for completion by ourselves and Mr. Wolfe, following which one copy would be returned to you.

“Our actuary advises us that the capital liability of the amount of annuity if payable as from 1st January 1940 works out at £88,049 and the present value of this as at 1st September 1939 is £87,177—. It is this latter amount which should be inserted in the agreement and on completion of the documents we would therefore either hold at your disposal or remit this sum to you.” (R. pp. 22, 83-84).

On August 22, 1939, Anglo sent Standard £87,177—the amount mentioned in the letter just quoted as the “present value” of “the capital liability of the amount of annuity *if payable from 1st January 1940.*” (Italics supplied.) This amount was converted by Standard into \$408,097.33 in United States currency at the official rate of exchange on that date (R. p. 26).

Petitioner definitely decided to retire in August 1939, but the date of his retirement was not fixed until later (R. p. 76).

On December 31, 1939, Anglo paid Standard £1943, which was converted by Standard into \$7,689.42 in United States currency at the official rate of exchange on that date (R. p. 26).

On January 9, 1940, an official of Standard wrote to R. A. Carder, a letter reading, in part, as follows:

“Final arrangements have been made, satisfactory to Mr. Wolfe, so that his retirement will become effective July 1, 1940. *Although our formal setup for taking care of the annuity is not completed, we have undertaken to guarantee Mr. Wolfe that the money which you have provided* (italics supplied), plus the additional amounts which Standard Oil Co. of New Jersey will be required to put up, will be used to assure him the annuity to which he is entitled, and there is no reason, therefore, why you should not formally record the transaction” (R. pp. 22-23).

The amount of £1943 paid by Anglo to Standard on December 31, 1939, represented “the difference between Anglo’s initial contribution of £87,177” (which had been made on the assumption that the petitioner would retire on January 1, 1940) “and a contribution of £89,120, the latter being the amount agreed upon with retirement effective July 1, 1940” (R. p. 96).

On March 22, 1940, “an agreement of annuity” drawn by an official of Standard was entered into between Anglo (which executed the agreement in London (R. p. 58)), Standard and petitioner (petitioner and Standard executed the agreement in New York (R. p. 58)), the pertinent parts of which read as follows:

“Whereas, Mr. Wolfe is Chairman and Managing Director of the Anglo Company and on March 1, 1931, undertook this assignment at the request of the Standard Company on the understanding that if he were eventually retired from the service of the Anglo Company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo Company as in effect on the date of retirement and that payment of such sterling pension would be

guaranteed by the Standard Company in dollars at an exchange rate of five dollars to the pound.

And Whereas, Mr. Wolfe is to be retired from the service of the Anglo Company on the first day of July, 1940.

And Whereas, the Anglo Company is unable to grant formally an annuity to Mr. Wolfe under its own superannuation scheme or pay same from its superannuation fund for the reason that such scheme and related fund are not applicable to any person who entered the employ of the Anglo Company subsequent to May 18, 1928.

And Whereas, the Anglo Company desires to recognize Mr. Wolfe's valuable services to the Anglo Company by contributing to the Standard Company a capital sum of £89,120-0-0 representing the liability which it would have incurred had it granted Mr. Wolfe a sterling pension equivalent to that payable under the superannuation scheme of the Anglo Company.

And Whereas, the Standard Company has agreed to accept the aforesaid £89,120-0-0 from the Anglo Company and to pay Mr. Wolfe a life annuity as hereinafter provided.

Now It Is Hereby Witnessed as follows:

1. That in consideration of the aforesaid understanding with Mr. Wolfe the Standard Company hereby covenants to pay Mr. Wolfe a life annuity of \$3,038.75 per month, effective July 1, 1940, with the understanding that should Mr. Wolfe's present wife, Marguerite W. Wolfe, survive him, monthly payments in the amount of \$3,038.75 each will be continued and paid to her for a period not to exceed twelve months and in no case beyond the date of her death.

2. Mr. Wolfe hereby accepts this annuity settlement as a complete discharge of any and all pension obligations of the Standard Company, the Anglo Company and any other associated companies.

3. In consideration of Mr. Wolfe's valuable services to the Anglo Company, the Anglo Company has paid to the Standard Company, as a contribution toward the cost of the annuity settlement, the sum of £89,120-0-0, the receipt of which sum the Standard Company doth hereby acknowledge.

4. In consideration of the aforesaid payment the Standard Company hereby indemnifies and for all time agrees to keep indemnified the Anglo Company from and against any liability which the Anglo Company might otherwise have had to Mr. Wolfe in respect to a pension.

5. If Mr. Wolfe shall die prior to July 1, 1940, then the Standard Company will forthwith on the death of Mr. Wolfe being proved to their reasonable satisfaction repay to the Anglo Company the £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof with interest thereon at the rate of 3% per annum from the date of payment until the date of repayment.

6. If Mr. Wolfe shall die on or after July 1, 1940, then the Standard Company shall be under no obligation to repay to the Anglo Company any portion of the sum of £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof'' (R. pp. 23-26).

The official rate of exchange on March 22, 1940, was \$3.724305 in United States currency for each English pound (R. p. 58).

Petitioner retired from the employ of Anglo on July 1, 1940. The official rate of exchange on July 1, 1940, was \$4.035 in United States currency for each English pound (R. pp. 58-59).

Beginning with a payment on July 31, 1940, petitioner has received \$3,038.75 per month (or \$36,465 per year) from Standard pursuant to the agreement of March 22, 1940 (R. p. 26). The \$36,465 per year thus received from Standard

is the equivalent of £7,293 converted at \$5 to the pound. £7,293 is the maximum annuity petitioner could have demanded from Anglo on his retirement on July 1, 1940, under the resolution of October 22, 1931 (R. p. 67).

On December 11, 1940, an official of Standard requested another official of Standard to secure signature cards from petitioner "to whom we pay a special annuity" (R. p. 97).

During the time that petitioner served as an executive of Anglo, from March 1, 1931 to July 1, 1940, neither Standard nor Export ever dominated the administration policies of Anglo. Anglo bought oil and gasoline from Standard, but it also bought it from other people. The administration policies of Anglo were left entirely and absolutely in the hands of the board of directors of Anglo (R. p. 65).

From March 1, 1931, to October 4, 1941, petitioner was a resident of England, a non-resident alien with respect to the United States (R. pp. 5, 13, 16). On October 4, 1941, he entered the United States under the authority of an immigration visa intending to become a resident (R. pp. 5, 13, 71). From October 4, 1941, until the date of the trial of this cause before The Tax Court of the United States, petitioner was a resident of the United States.

Petitioner reported in his income tax return for the calendar year 1941, the sum of \$3,041.51 as "income from annuities" with the following explanation:

"The taxpayer receives an annuity from the Standard Oil Company of New Jersey, the payments being made at the rate of \$3,038.75 per month. The payments received in 1941 during the taxpayer's residence in the United States totalled \$8,822.18. The cash consideration paid to the Standard Oil Company of New Jersey totalled \$415,786.75.* The taxpayer

* This was the sum of the \$408,097.33 paid August 22, 1939 (see page 13 herein) and the \$7,689.42 paid December 31, 1939 (see page 13 herein).

is excluding from his gross income the amount of \$5,780.67, representing the excess of the annuity payments received over three per centum of the principal amount for the period during which the taxpayer was a resident of the United States'' (R. p. 71).

On December 11, 1944, the respondent mailed to petitioner a statutory notice of deficiency in the amount of \$1,101.49 in income taxes for the year 1941 (R. pp. 4, 9-11, 12, 15). Said notice stated:

''It is determined that the entire amount received by you from the Standard Oil Company of New Jersey during your residence in the United States constitutes gross income under the provisions of section 22 of the Internal Revenue Code. Accordingly, income from that source has been increased from \$3,041.51 reported by you to \$8,822.18'' (R. p. 11).

A timely appeal from this determination followed (R. pp. 4-8). From an adverse decision of The Tax Court of The United States (R. p. 40) this petition for review is taken (R. pp. 41-44). The opinion of The Tax Court of The United States is reported in 8 T. C. 689 and the findings of fact and opinion of The Tax Court of The United States will be found in the record on pages 14 to 40.

The question involved is whether, as the respondent will contend, the amounts received by petitioner from Standard during 1941 and while he was a resident of the United States are taxable in full or, as petitioner maintains, there should be excluded from gross income the excess of the amount so received over an amount equal to 3 per centum of the amount paid by Anglo to Standard as hereinbefore stated.

SPECIFICATION OF ERRORS RELIED UPON

The following is a specification of errors relied upon:

Specifications of Errors Relating to the Findings of Fact

1. *The Tax Court of The United States erred in failing to find as a fact that the deficiency from the determination of which this appeal was taken to The Tax Court of The United States was based upon a determination of the petitioner's taxable net income for the calendar year 1941, in which computation no part of the annuity paid to the petitioner by Standard was excluded from petitioner's gross income.*

Statement of wherein the findings of fact are, with respect to this the First Specification of Error, erroneous.—

In paragraph 5 (j) of his petition to The Tax Court of The United States, the petitioner alleged that the deficiency from the determination of which the appeal to The Tax Court of The United States was taken, was based upon a computation of the petitioner's taxable net income for the calendar year 1941 in which computation no part of the said annuity was excluded from the petitioner's gross income (R. p. 7). This allegation was admitted by paragraph 5 (j) of the answer (R. p. 13). There is therefore no issue as to the truth of the allegation.

It was error not to find the admitted fact because the respondent's failure to exclude a portion of the annuity from petitioner's gross income is, in the last analysis, that of which the petitioner complains in this proceeding.

2. *The Tax Court of The United States erred in failing to find as a fact that petitioner did not, prior to March 1, 1931, discuss with any official of Standard or Export the*

question of his retirement pay in the event of his eventual retirement, and that the question of petitioner's retirement pay in the event of his eventual retirement was never, prior to March 1, 1931, mentioned in the conversations between petitioner and officials of Standard and Export in any way, shape or form.

Statement of wherein the findings of fact are, with respect to this the Second Specification of Error, erroneous.—

On direct examination, petitioner testified: That prior to March 1, 1931, two or three months prior to that, Mr. G. Harrison Smith, who was the senior vice-president of Imperial, asked the petitioner if he (petitioner) would go to England to take over the duties as managing director of Anglo; that he (petitioner) had conversations with executives of Standard with respect to the matter of petitioner's going to England to take over this new position; that he (petitioner) talked with several of the executives; that he (petitioner) talked to Mr. Teagle, who was then president of Standard, to Mr. Hunt, who was one of the vice-presidents, to Mr. James Moffett, who was one of the vice-presidents, and to Mr. D. L. Harper, who was president of Export; that he (petitioner) talked to these gentlemen in Standard largely to get the background of Anglo (R. p. 60); that he (petitioner) did not at any time discuss with Mr. Smith, Mr. Teagle, Mr. Hunt, or any of the other gentlemen whose names he had mentioned, the question of his (the petitioner's) retirement pay in the event of his eventual retirement; that the question of petitioner's retirement pay was never mentioned,—in any way, shape or form (R. p. 61).

With respect to the first paragraph of the agreement of March 22, 1940, which provides that petitioner undertook the assignment as chairman and managing director of

Anglo on March 1, 1931, on the understanding that if he were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo and that payment would be guaranteed by Standard (R. pp. 23-24), petitioner testified that there was no understanding with any officer of Standard or Imperial; that the understanding stated in that paragraph was petitioner's understanding; *that he had not discussed the matter with any official of Standard or Imperial* (R. p. 61).

On cross examination, petitioner testified that he (*petitioner*) *had no understanding as to his retirement pay at the time he entered the employ of Anglo* (R. p. 73).

No evidence contradictory to the foregoing was offered at the trial; therefore there is no issue as to truth of the fact which The Tax Court of The United States failed to find.

It was error not to find such fact. The respondent's entire theory in this case is that Standard was not the writer of an annuity, that, on the other hand, Standard was, in entering into the contract of March 22, 1940, satisfying an obligation of Standard to petitioner. The fact that petitioner did not even discuss with any officer of Standard the question of his retirement pay is certainly pertinent to the issue of whether Standard had an obligation to petitioner with respect to that retirement pay.

3. *The Tax Court of The United States erred in failing to find as a fact that the facts stated in the paragraph beginning "Whereas" of the contract between petitioner, Anglo and Standard, set forth in the eleventh paragraph of the findings of fact* (R. pp. 23-24), *are true except that there was no understanding with any officer of Standard*

or of Imperial that if petitioner were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo as in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard at an exchange rate of five dollars to the pound.

Statement of wherein the findings of fact are, with respect to this the Third Specification of Error, erroneous.—

The undisputed evidence as to the truth of the facts stated in the paragraph beginning “Whereas” of the contract between petitioner, Anglo, and Standard (R. pp. 23-24) with respect to the alleged understanding with officers of Standard and Imperial that if petitioner were eventually retired from the service of Anglo he would receive a life annuity, etc. is set forth under specification of error 2. That evidence is all to the effect that there was no such understanding.

With respect to the alleged understanding prior to March 1, 1931, with officers of Standard that payment of such sterling pension would be guaranteed by Standard at an exchange rate of five dollars to the pound, the undisputed evidence is:

On direct examination the petitioner testified that he (petitioner) had always been a citizen of Canada (R. p. 59). As The Tax Court has correctly found as facts petitioner resided in Canada until 1931 and in England from 1931 to October 4, 1941 (R. p. 16). On cross examination petitioner testified that when he went to England in 1931 Standard did not guarantee the payment of a retirement to him (R. pp. 73-74). On direct examination, petitioner testified that: he was a real sufferer from asthma and had been advised by his physician that when the opportune time came he should get out of England and go to a warmer country,

such as California (R. p. 66); that prior to August 1939 he decided to retire (R. p. 65); that *after making the decision to retire*, he had conversations with an executive of Anglo in which he (petitioner) stated that he intended to live in the United States and that he would want his annuity payable to him in American dollars (R. p. 66), and that thereafter petitioner discussed the matter with an executive of Standard, in which discussion the executive of Standard particularly asked petitioner what the rate of exchange was that petitioner wanted (R. p. 67). On *June 16, 1939*, the same officer of Standard with whom petitioner had had said discussion wrote him (petitioner) that the problem of paying the annuity in dollars had been left for *future* consideration (R. pp. 87-88). A memorandum accompanying said letter of *June 16, 1939*, gave the amount of annuity due petitioner, assuming his retirement on various dates, *in pounds not in dollars* (R. p. 89). In a memorandum dated *June 21, 1939*, prepared by an employee of Standard, the annuity due petitioner, assuming retirement on various dates, was shown in dollars, *converted at \$4.68 to the pound*, not at \$5.00 to the pound (R. p. 92). In a memorandum from one executive of Standard to another dated *June 29, 1939*, it was stated as an understanding that petitioner was to receive a life annuity payable in the United States in dollars converted at the rate of \$5.00 to the pound (R. p. 20) and that *subject to proper approval* it was proposed that the annuity be paid in New York in dollars, converted at the rate of \$5.00 to the pound (R. pp. 20-21, 81-83).

From the foregoing undisputed evidence it is obvious that petitioner did not on *March 1, 1931*, undertake the assignment as chairman and managing director of Anglo on an understanding with officers of Standard that if he were eventually retired from the service of Anglo he would re-

ceive a life annuity based on the provisions of the superannuation scheme of Anglo as in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard in dollars at an exchange rate of five dollars to the pound.

It was error to fail to so find as a fact. The respondent's case depends in large part on the premise that Standard assumed an obligation to petitioner prior to March 1, 1931. That Standard assumed no such obligation is certainly pertinent.

4. *The Tax Court of The United States erred in finding as a fact that when the petitioner undertook the assignment of chairman and managing director of Anglo at the request of Standard it was the understanding that if he were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard in dollars at an exchange rate of five dollars to the pound.*

Statement of wherein the findings of fact are, with respect to this the Fourth Specification of Error, erroneous.—
The undisputed evidence with respect to this specification of error is set forth under specification of error 2 and specification of error 3. Every bit of that evidence negatives, rather than affirms, the finding of The Tax Court of The United States. For example, disregarding for the moment the direct denials of the petitioner, why should a citizen of Canada, who had always been a resident of Canada, and who was taking a position in England, demand that an annuity to be paid to him on his eventual retirement from that position in England, be paid in American dollars? Or why, under such circumstances, should anyone

guarantee the payment of such an annuity in dollars? It is quite apparent that the idea of paying the annuity in dollars arose from the advice of petitioner's physician that, because of his asthma, he go to a climate such as California (R. p. 66) and that there was *no* discussion of payment of the annuity in dollars until 1939, when petitioner decided to retire and live in the United States (R. pp. 65-66). If Standard *in 1931* had had an understanding that petitioner on retirement was to receive his annuity in dollars converted at \$5.00 to the pound, why did an officer of Standard *in 1939* ask what rate of exchange petitioner would expect? If Standard *in 1931* had an understanding that petitioner on retirement was to receive his annuity in dollars, why did an officer of Standard *on June 16, 1939*, write that the problem of paying the annuity in dollars had been left for *future* consideration? If Standard *in 1931* had an understanding that petitioner on retirement was to receive his annuity in dollars converted at \$5.00 to the pound, why did Standard compute the annuity *on June 16, 1939, in pounds*, not in dollars? And why did Standard *on June 21, 1939*, compute the annuity at a rate other than \$5.00 to the pound? If *in 1931* Standard had an understanding that petitioner, on retirement, was to be paid his annuity in dollars converted at \$5.00 to the pound, why was it that *on June 29, 1939*, the proposal that the annuity be paid in New York in dollars, converted at the rate of \$5.00 to the pound, was "subject to proper approval"?

5. *The Tax Court of The United States erred in failing to find as a fact that when petitioner went to London in 1931 he was not eligible to participate in the superannuation scheme of Anglo because the superannuation scheme had been changed to preclude participation by anybody who came into the company after some time in May 1928.*

Statement of wherein the findings of fact are, with respect to this the Fifth Specification of Error, erroneous.—

The petitioner testified on direct examination: That he found, when he went to England, that so far as he was concerned, with respect to the superannuation scheme of Anglo, he was not eligible because the scheme had been changed to preclude participation by anybody who came into the company after some time in May 1928 (R. p. 63).

There is no evidence to the contrary. Hence, there is no issue as to the truth of the facts in question.

It was error to fail to so hold. The fact that petitioner found that he was not eligible for Anglo's superannuation scheme was one of the reasons for the adoption by the board of directors of Anglo of the resolution of October 22, 1931 (R. p. 19) and is therefore pertinent.

6. *The Tax Court of The United States erred in failing to find as facts that during the time the petitioner served as managing director and chairman of Anglo, neither Standard nor Export ever dominated the administration policies of Anglo; that Anglo bought oil and gasoline from sundry people; that Anglo bought oil and gasoline from Standard and from others; and that the administration policies of Anglo were left entirely and absolutely in the hands of the board of directors of Anglo.*

Statement of wherein the findings of fact are, with respect to this the Sixth Specification of Error, erroneous.—

On direct examination, the petitioner testified: That during the time that he served as managing director and chairman of Anglo, neither Standard nor Export ever dominated the administration policies of Anglo; that Anglo bought oil and gasoline from sundry people; that Anglo bought from Standard; that Anglo bought from outsiders; and that the

administration policies of Anglo were left entirely and absolutely in the hands of the board of directors of Anglo (R. p. 65).

On cross examination, petitioner testified: That he (petitioner) elected the board of directors of Anglo; that he nominated the people for election; that he thought that in all cases his nominations were agreeable to Standard; that in other words, Standard had the final say as to members of the board of directors of Anglo; that had Standard disapproved of one of his nominations, he presumed it would be one of their prerogatives, because of their one hundred per cent ownership of the stock of Anglo, to have elected any one else whom they had chosen (R. pp. 72-73).

The cross examination in no sense contradicts the direct testimony. There is therefore no issue as to the truth of the facts in question.

It was error to fail to so hold. The facts in question are pertinent as indicating that Anglo and Standard were separate entities and that the obligation of Anglo was not the obligation of Standard.

7. The Tax Court of The United States erred in failing to find as a fact that the superannuation scheme of Anglo was not in a very healthy position because of the state of some of its investments and that from time to time the board of directors of Anglo made very liberal contributions to the superannuation fund to take care of liabilities Anglo owed to those who were under the plan.

Statement of wherein the findings of fact are, with respect to this the Seventh Specification of Error, erroneous.—
On direct examination the petitioner testified: That he found when he went to England that the funds of Anglo's superannuation scheme were invested in stocks which he did

not consider investment stocks; that in other words, he thought that the fund was not in a very sound financial condition (R. p. 63); that the superannuation scheme of Anglo was not in a very healthy position because of the state of some of its investments; that from time to time the board of directors of Anglo made very liberal contributions to the fund; that those contributions were made to take care of the liabilities Anglo owed to those who were under the plan; and that Anglo made contributions in excess of what they would have made except for the condition of the fund, the condition of the investments (R. p. 65).

This testimony was not contradicted. There is therefore no issue as to the truth of the facts in question.

It was error to fail to so hold. The facts in question were among the reasons for the adoption of the resolution of October 22, 1931 (R. p. 19) by the board of directors of Anglo, and are therefore pertinent.

8. *The Tax Court of The United States erred in failing to find as a fact that the petitioner wanted an annuity payable in dollars because he had been advised by his physician on many occasions that England was not a proper climate for him and he intended to go to the United States upon his retirement.*

Statement of wherein the findings of fact are, with respect to this the Eighth Specification of Error, erroneous.—

On direct examination the petitioner testified: That prior to August 1939, he decided to retire from his position with Anglo; that he had been advised by his physician on many occasions that England was not a proper climate for petitioner; that petitioner was a real sufferer from asthma and had been advised by his physician that when the opportune time came, petitioner should get out of England and go to a warmer climate, such as California (R. p. 66); that after

making the decision to retire, petitioner had conversations with Mr. Carder, who was on the board of directors and was financial director of Anglo; that petitioner told Mr. Carder that he (petitioner) intended to live in the United States; that petitioner told Mr. Carder further that when he retired (and he was planning on retiring) petitioner would want his annuity payable to him in American dollars (R. p. 66).

This evidence was undisputed. There is therefore no issue as to the facts in question.

It was error to fail to so hold. The facts in question are pertinent in that they show why the annuity was payable in dollars and in that they negative the fact, erroneously found by The Tax Court of The United States, that payment of the annuity in dollars had been guaranteed by Standard in 1931.

9. The Tax Court of The United States erred in failing to find as a fact that in 1939 the financial director of Anglo suggested that the problem of the petitioner's annuity might be worked out by Anglo sending over a certain amount of money to Standard and that the latter would pay the annuity.

Statement of wherein the findings of fact are, with respect to this the Ninth Specification of Error, erroneous.—

On direct examination petitioner testified: That prior to August 1939, he decided to retire from his position with Anglo (R. p. 65); that after making the decision to retire, he had conversations with Mr. Carder who was on the board of directors and financial director of Anglo; that he told Mr. Carder that he (petitioner) intended to live in the United States; that he told Mr. Carder further that when he (petitioner) retired (and he was planning on retiring) he would want his annuity payable to him in American dollars; that he and Mr. Carder discussed the matter of his

purchasing an annuity from an insurance company; and that then Mr. Carder suggested that it might be worked out by Anglo sending over a certain amount of money to Standard and the latter would pay the annuity (R. p. 66).

There is no evidence to the contrary. Hence there is no issue as to the facts in question.

It was error to fail to so find. The facts in question are material as showing how it happened that Standard paid the annuity to petitioner and as negating the erroneous inference of The Tax Court of The United States that Standard in paying the annuity was satisfying an obligation incurred by it in 1931.

10. *The Tax Court of The United States erred in failing to find as a fact that pursuant to the resolution of the board of directors of Anglo, dated October 22, 1931, Anglo was obligated to pay petitioner a pension upon retirement of the sum of £7,293 per annum.*

Statement of wherein the findings of fact are, with respect to this the Tenth Specification of Error, erroneous.—

On direct examination the petitioner testified: That the date upon which he had decided to retire was July 1, 1940; that in the last five years of his service with Anglo, his average compensation was £11,000 per annum; that on the basis of the resolution of October 22, 1931, he was to be deemed to have been in service since June 1902; that, on this basis, on July 1, 1940, he had been in service 38 years; that on July 1, 1940 he was sixty years of age; that the maximum annuity he could demand was 66.3 per cent of £11,000 or £7,293 (R. p. 67). In a memorandum dated June 29, 1939, from one executive of Standard to another, it was stated:

“We understand that under the agreement with Mr. Wolfe, he is to receive, upon retirement, a life annuity calculated in accordance with the Anglo Plan

and their discount absorption program . . . the annuity. . . I give below a statement showing the amount of Mr. Wolfe's annuity computed as of five possible retirement dates, . . . :

Assumed Effective Date	Pounds
.....
7/1/40	7,293
..... "

(R. pp. 81-82.)

There is no evidence to the contrary. Therefore, there is no issue as to the truth of the facts in question.

It was error to fail to so find. The annuity which is the subject of this controversy is \$36,465, which is £7,293 converted at \$5.00 to the pound. That Anglo was, from October 22, 1931, obligated to pay this annuity is pertinent to the question of whether Standard had any obligation to petitioner or whether Anglo satisfied that obligation by purchasing an annuity from Standard.

11. *The Tax Court of The United States erred in failing to find as a fact that the petitioner was never in the employ of Standard or Export.*

Statement of wherein the findings of fact are, with respect to this the Eleventh Specification of Error, erroneous.—

On direct examination the petitioner testified: That he was never in the employ of Standard; that he was never in the employ of Export (R. p. 68). Kenneth N. Rackley, called as a witness on behalf of the respondent, who was, at the time of the trial, secretary of the annuities and benefits committee of Standard (R. p. 77), testified, on cross examination, that to his knowledge petitioner had never been an employee of Standard; and that when he spoke on direct ex-

amination (R. p. 86) of the official file of Standard relating to the retirement of petitioner (R. p. 80) as the employee's file, it was not his intention to characterize petitioner as an employee of Standard (R. p. 86).

There is no evidence to the contrary. There is no issue therefore as to the truth of the facts in question.

It was error to fail to so find. The fact that petitioner was never an employee of either Standard or of Export goes to the heart of this controversy. Standard could not, under such circumstances, have had any obligation to him as an employee.

12. *The Tax Court of The United States erred in failing to find as a fact that petitioner considered that Anglo had an obligation to make retirement payments of some kind to him prior to the agreement of March 22, 1940; that Anglo was obligated only to pay an annuity based on petitioner's services and in accordance with Anglo's scheme of superannuation; and that that was Anglo's only obligation to the petitioner prior to the agreement of March 22, 1940.*

Statement of wherein the findings of fact are, with respect to this the Twelfth Specification of Error, erroneous.

—On cross examination the petitioner testified: That he definitely considered that Anglo had an obligation to make retirement payments of some kind prior to the agreement of March 22, 1940; that Anglo was obligated only to pay an annuity based on his services and in conformity with Anglo's superannuation scheme; and that that was Anglo's only obligation to petitioner prior to the agreement (R. p. 73).

There is no evidence to the contrary. Hence there is no issue as to the truth of the facts in question.

It was error not to so find. Petitioner's understanding of what Anglo's obligation to him was, prior to the agreement of March 22, 1940, is certainly material to the question of the nature of the agreement by which that obligation was satisfied.

13. *The Tax Court of The United States erred in failing to find as a fact that at the time the petitioner became an employee of Anglo there was no correspondence or other writing entered into between himself and Anglo and Standard; that petitioner did not ever have any writing to evidence that he was being offered an executive position with Anglo; and that there was no type of contract entered into between petitioner and anybody else as to his employment by Anglo.*

Statement of wherein the findings of fact are, with respect to this the Thirteenth Specification of Error, erroneous.—On cross examination the petitioner testified: That there was no correspondence or other writing entered into between himself and Anglo, nor Standard, at the time or just about the time he went to work for Anglo; that he did not ever have any writing to evidence that he was being offered an executive position with Anglo (R. p. 74); and that there was no type of contract entered into between petitioner and any one else as to his employment by Anglo (R. pp. 74-75).

There is no evidence to the contrary. Consequently there is no issue as to the truth of the facts in question.

It was error to fail to so find. The facts in question are material to the issue of whether Standard in 1931 guaranteed petitioner's retirement pay and hence whether the contract of March 22, 1940 was a contract of annuity or a satisfaction by Standard of an obligation assumed by it in

1931. Since there was no writing, the alleged guarantee of Standard would have been unenforceable under the statute of frauds.

14. *The Tax Court of The United States erred in finding as a fact that petitioner paid no income tax to England or Canada on the payments made by Anglo to Standard.*

Statement of wherein the findings of fact are, with respect to this the Fourteenth Specification of Error, erroneous.—It is true that petitioner paid no income tax to England or Canada on the payments made by Anglo to Standard. It was, however, error to find this as a fact since whether a tax was paid to England or Canada is completely immaterial to the issue in this case. It may be, for all we are informed, that no tax was due to either England or Canada. In any event neither the English nor the Canadian income tax laws are material to a determination of the income tax laws of The United States.

15. *In the alternative, if it should be held that The Tax Court of The United States did not err as alleged in Specification of Error 14—The Tax Court of The United States erred in failing to find as facts that while petitioner was living in England and an officer of Anglo he did not prepare his own income tax returns; that his income tax returns were prepared by the solicitor for Anglo; that the solicitor for Anglo knew about the contract of March 22, 1940; that petitioner had told said solicitor about that contract; that said solicitor did not advise petitioner as to whether or not the pounds paid by Anglo to Standard were taxable to petitioner in England; that petitioner did not know anything about that particular phase (that is, the question of whether or not the pounds paid by Anglo to Standard were taxable to him in England) of the English income tax law; that no tax was withheld on the £89,120*

paid by Anglo to Standard; and that petitioner paid income taxes to England on his salary of £11,000 per year received from Anglo.

Statement of wherein the findings of fact are, with respect to this the Fifteenth Specification of Error, erroneous.

—The only possible purpose of the respondent in offering proof that petitioner paid no income taxes to England or Canada on the £89,120 paid by Anglo to Standard was to create the inference that petitioner had not been meticulous in performing his tax obligations. If The Tax Court of The United States did not err in finding as a fact that petitioner did not pay income taxes to England on the stated sum, then it was error for the Court below to fail to find the other facts in the record which would have explained the facts found. Such other facts, none of which is disputed, are as follows:

On redirect examination, petitioner testified: That while he was living in England and an officer of Anglo, he did not prepare his own income tax returns; that his income tax returns were prepared by Mr. Montague Piesse, the solicitor for Anglo; that Mr. Piesse knew about the contract of March 22, 1940; that petitioner told Mr. Piesse about that contract; that Mr. Piesse did not advise petitioner as to whether or not the pounds paid by Anglo to Standard were taxable to petitioner in England; that petitioner did not know anything about that particular phase of the English income tax laws; that no tax was withheld by Anglo; and that petitioner paid income taxes to England on his salary of £11,000 per annum (R. p. 77).

16. *The Tax Court of The United States erred in finding as a fact that Standard has withheld income tax from the monthly payments made by Standard to the petitioner.*

Statement of wherein the findings of fact are, with respect to this the Sixteenth Specification of Error, erroneous.

—It is true that Standard has withheld income tax from the monthly payments made by Standard to the petitioner. It was nevertheless error to find as a fact that Standard had withheld, for the reason that the fact of withholding is immaterial. The withholding was nothing more than an expression of Standard's judgment upon the issue involved in this case—an expression incidentally which was coloured by a desire to play safe. It was for The Tax Court of The United States (as it is for this court) to decide the issue between petitioner and respondent—not for Standard to do so. The Tax Court of The United States would have clearly erred had it asked Mr. Eckman, the respondent's counsel at the trial, for his opinion on the issue and had based a finding of fact on his opinion. The Court below equally erred when it based a finding of fact of this kind on the act of Standard, which clearly was merely protecting itself from possible liability if the issue in this case were decided against the petitioner.

17. *In the alternative, if it should be held that The Tax Court of The United States did not err as alleged in Specification of Error 16—then The Tax Court of The United States erred in failing to find as facts that the witness, George S. Koch, tax counsel for Standard, in directing Standard to withhold from the sums paid by Standard to petitioner, gave his opinion; that in doing so he expressed his legal opinion as a lawyer; that it was his duty to protect Standard; that any doubts would have been resolved in favor of Standard; that while at the time the decision was made, he did not have any doubts, he has since had doubts; and that he was simply advising his client, his employer, to do whatever would protect Standard most regardless of the effect upon petitioner.*

Statement of wherein the findings of fact are, with respect to this the Seventeenth Specification of Error, erroneous.—If it was not error for The Tax Court of The United States to find as a fact that Standard has withheld income tax from the monthly payments made by it to petitioner, then it was error for The Tax Court of The United States to fail to find the other undisputed facts in the record which explain the nature of and the reason for that withholding. Such other undisputed facts are as follows:

George S. Koch, called as a witness on behalf of the respondent, testified on direct examination: That he is tax counsel for Standard (R. p. 101); that he participated in the decision to withhold from the monthly payments made to petitioner by Standard; that such sums were withheld (R. p. 102); that he directed Standard to withhold those sums because the statute on withholding dealt with the question of wages, and wages only, and the regulations provided that pensions and retirement income were treated as wages; that that was the basis on which the decision was made. On cross examination, the witness testified: That he had given his opinion; that he had stated why he directed the withholdings; that in doing so he had expressed his legal opinion as a lawyer; that it was “assuredly” and “certainly” his duty to protect Standard; that any doubts would have been resolved in favor of Standard; that he did not necessarily believe he had any doubts when the decision was made; that frankly he has had doubt; and that he was simply advising his client, his employer, to so act that they would be protected “whichever way the cat jumped” (R. p. 104).

18. *The Tax Court of The United States erred in failing to find as a fact that on January 12, 1940, an executive of Standard wrote an executive of Anglo as follows:*

“When I wrote you the other day, I failed to realize that you have a three-corner agreement between Standard Oil of New Jersey and Mr. Wolfe, as a means of insuring that Anglo had discharged its liability for any pension payments to Mr. Wolfe.

This phase of the case has not been adequately considered, and we are now undertaking to get our lawyers to agree to some formal release that will be agreed to before the annuity becomes payable on July the 1st.

You can be sure that this will be advanced as promptly as possible.” (R. p. 85).

Statement of wherein the findings of fact are, with respect to this the Eighteenth Specification of Error, erroneous.—There can be no issue as to the existence of the quoted letter (R. p. 85).

It was error to fail to find said letter as a fact. The Tax Court of The United States did find as a fact the letter of January 9, 1940 (R. pp. 22-23), obviously the letter referred to in that part of the letter of January 12, 1940 which reads “When I wrote you the other day, I failed, etc.” The Tax Court of The United States, in its opinion (R. p. 36), uses the letter of January 9, 1940 as evidence that petitioner’s retirement would require Standard to put up money to provide for petitioner’s retirement. But the letter of January 12, 1940 clearly indicates that the letter of January 9, 1940, relied upon by the Court below, was based upon a misunderstanding. “I failed to realize that you have a three-corner agreement between Standard Oil of New Jersey and Mr. Wolfe, as a means of insuring that

Anglo had discharged its liability for any pension payments to Mr. Wolfe.” The liability of Anglo was its liability under the resolution of October 22, 1931—precisely the liability which it discharged by the agreement of March 22, 1940. Standard did not put up and was not required to put up any money. If petitioner lives long enough, so that the annuity paid to him by Standard exhausts the money paid by Anglo to Standard, Standard will, *like the writer of any annuity*, be required to use its own funds to continue to pay the annuity.

19. *The Tax Court of The United States erred in failing to find as facts the existence of the documents set forth on pages 90 to 93, both inclusive, pages 95 and 96, and pages 97 and 98 of the record.*

Statement of wherein the findings of fact are, with respect to this the Nineteenth Specification of Error, erroneous.—There can be no issue as to the existence of the documents in question. The secretary of the annuities and benefits committee of Standard (R. p. 77) testified that each was in the official file of Standard relating to the retirement of petitioner (R. pp. 80, 90, 95, 97).

It was error to fail to find the existence of said documents as facts. They, together with other facts in the record, indicate that the agreement of March 22, 1940 was the result of negotiation, not of an agreement made as far back as 1931 that Standard would guarantee petitioner’s retirement pay in the event of his eventual retirement. They indicate that the process of negotiation which eventually took the form of Anglo’s purchasing an annuity for petitioner from Standard was evolutionary. Finally, they indicate that the negotiations considered the contract of March 22, 1940 as the purchase by Anglo of an annuity for petitioner from Standard.

20. *The Tax Court of The United States erred in finding as a fact that petitioner had no control over the payment of the £89,120 by Anglo to Standard in 1939.*

Statement of wherein the findings of fact are, with respect to this the Twentieth Specification of Error, erroneous.—It is true that on cross examination petitioner testified that he had no control over “*Why the payments were made, . . . in August and December, 1939, when I did not retire until July, 1940*” (R. p. 76). This is the only evidence in the record having to do with control by petitioner over the payments. Obviously, petitioner’s testimony had to do with the question of why the payments were made prior to his retirement instead of at the time of his retirement. The finding of fact is a distortion of the evidence. The payments were made as the result of negotiations of which petitioner was a party; to the extent that he participated in those negotiations he controlled the payments.

Specifications of Errors Relating to the Admission of Evidence

21. *The Tax Court of The United States erred in receiving in evidence testimony to the effect that the petitioner did not pay a tax to England or Canada on the £89,120 paid by Anglo to Standard.*

Quotation of the grounds urged at the trial for the objection:

“Mr. Wynn: I object, your Honor.

“Mr. Eckman: Your Honor, it shows how the witness considers the money was paid.

“Mr. Wynn: It was not a question of what he considered it. It is what it was.

Therefore I urge it is immaterial as to what he did as far as Canadian and English taxes are concerned” (R. p. 75).

The full substance of the evidence admitted. Petitioner did not pay any income tax to England or to Canada on the payment of the £89,120 paid by Anglo to Standard (R. pp. 75-76).

22. *The Tax Court of The United States erred in admitting to evidence testimony from the petitioner as to the purpose of Standard in withholding a part of the monthly payments made to the petitioner.*

Quotation of the grounds urged at the trial for the objection:

No grounds were urged for the reason that the Court overruled the objection before such grounds could be stated. The record (p. 76) is as follows:

“Mr. Wynn: If your Honor please, I object to this witness being asked what purpose the Standard Oil Company of New Jersey had in that.

“The Court: He is one party to this. He may have some knowledge that may be of value. The objection is overruled.”

It had been the purpose of counsel for the petitioner to urge that the question “For what purpose did Standard withhold a part of the monthly payments to petitioner?” called for a conclusion.

The full substance of the evidence admitted.—The purpose of Standard in withholding a part of the monthly payments to petitioner was what the witness thought they would call a withholding tax (R. p. 76).

23. *The Tax Court of The United States erred in admitting the testimony of the witness, Kenneth N. Rackley, to the effect that he was familiar with the policy of Standard with regard to the retirement of its employees.*

Quotation of the grounds urged at the trial for the objection:

“Mr. Wynn: If your Honor please, I object. There has been no proof in this record that Mr. Wolfe was ever an employee of the Standard Oil Company of New Jersey, and therefore I think this evidence is not pertinent to the issue before the Court.

“He was an employee of the British company” (R. p. 78).

The full substance of the evidence admitted.—The witness was familiar with the policy of Standard with regard to the retirement of its employees (R. p. 78).

24. *The Tax Court of The United States erred in admitting the testimony of the witness, Kenneth N. Rackley, to the effect that Standard has never given a retiring employee a lump sum of money in lieu of pension payments; that Standard has never given a retiring employee a choice between receiving a lump sum of money and receiving the payments in the usual manner; and that such a lump sum payment would not be in accordance with the policy of Standard.*

Quotation of the grounds urged at the trial for the objection:

“Mr. Wynn: If your Honor please, I object. In the first place, we concede that Mr. Wolfe was not entitled to any lump sum of money, so that this is not pertinent to the issue before the Court.

“In the second place, what Standard Oil may have done to some other employees is not pertinent to the agreement it made with Mr. Wolfe” (R. p. 79).

The full substance of the evidence admitted.—Standard has not to the witness' knowledge ever given a retiring employee a lump sum of money in lieu of pension payment

(R. p. 79). Standard has not to the witness' knowledge ever given a retiring employee a choice between receiving a lump sum of money and receiving the payments in the usual manner (R. pp. 79-80). Such a lump sum payment would not be made in accordance with the policy of Standard (R. p. 80).

25. *The Tax Court of The United States erred in admitting to evidence testimony of the witness, Kenneth N. Rackley, to the effect that the file of Standard contains no mention or discussion of paying a lump sum to the petitioner upon his retirement.*

Quotation of the grounds urged at the trial for the objection:

“Mr. Wynn: If your Honor please, I will have to renew my objection to this line of questions that I made a moment ago” (R. p. 86).

The full substance of the evidence admitted.—There is in the Standard file no mention or discussion of paying a lump sum to the petitioner upon his retirement (R. p. 86).

26. *The Tax Court of The United States erred in admitting in evidence the testimony of the witness, George S. Koch, to the effect that he participated in the decision to make withholdings from the monthly payments made by Standard to the petitioner; that such sums were withheld; and in admitting evidence as to why the witness, George S. Koch, directed Standard to withhold such sums.*

Quotation of the grounds urged at the trial for the objection:

“Mr. Wynn: Your Honor, I object to it as being immaterial to the issue in this case” (R. p. 102).

“ . . . we are not interested in the legal opinion. I do not believe this Court needs the benefit of legal

opinion. That is one of the questions for you to determine, sir. . . . I do not think that we are at all interested here in what the motives of Standard Oil Company may have been in withholding or not withholding in respect to Mr. Wolfe. At best it would be no more than the opinion of the executives of Standard Oil, including Mr. Koch, as to what they should do for their own protection. It has nothing to do with the issue before this Court, but it is primarily a matter of opinion. . . . I object to the characterization of Mr. Wolfe as an employee. That has not been proved.” (R. p. 103).

The full substance of the evidence admitted.—The witness participated in the decision to make withholdings from the monthly payments made to petitioner by Standard. Such sums were withheld (R. p. 102). The witness directed Standard to withhold such sums because the statute on withholding dealt with the question of wages, and wages only, and the regulations provided that pensions and retirement income were treated as wages. That was the basis on which the decision was made.

Specifications of Errors Not Relating to the Findings of Fact and Not Relating to the Admission of Evidence

27. *The Tax Court of The United States erred in concluding that the amounts received by petitioner were not received as an annuity under an annuity contract, but were received as a pension in consideration of services rendered in prior years.*

28. *The Tax Court of The United States erred in concluding that “the arrangement carried out here provided ‘benefits from a retirement fund’ in the nature of pension compensation for services rendered.”*

29. *The Tax Court of The United States erred in concluding that if the petitioner had not "taxable income" in 1940 in the "annuity" funds, he had no cost to recover tax free later.*

30. *The Tax Court of The United States erred in entering its final order of redetermination that there is a deficiency in income tax for the year 1941 in the amount of \$1,101.49.*

31. *The Tax Court of The United States erred in failing to enter a final order of redetermination that there is no deficiency in income taxes for the year 1941.*

SUMMARY OF THE ARGUMENT OF THE CASE

The decision below should be reversed (1) if in the taxable year 1941, an amount was received as an annuity under an annuity contract, and (2) if a premium or consideration was paid for such annuity.

In the taxable year 1941 an amount was received as an annuity under an annuity contract. It is not disputed that an amount was received. Said amount was received as an annuity under an annuity contract. The agreement under which the amounts were received is within every legal and commonly accepted meaning of the term. The fact that the contract was not a commercial annuity is immaterial. The reasoning of the Court below is unsound. Whether Standard guaranteed petitioner's pension and whether Anglo merely made a contribution to the cost of that pension is immaterial; but the facts are that neither of those premises is supported by the record. *Hooker v. Hoey* (27 Fed. Supp.

489, affirmed 107 F. (2d) 1016) is not a precedent for a decision adverse to the petitioner.

A premium or consideration of \$415,786.75 was paid for such annuity. That the payment was made is not in dispute. Under the decisions that payment was "the aggregate premiums or consideration paid for such annuity". The fact that petitioner was a non-resident alien at the time of such payment and therefore paid no income tax on said payment is immaterial. Income is determined by its nature not by the fact that a tax has been paid thereon.

ARGUMENT OF THE CASE

Introduction

Section 22 (b)(2) of the Internal Revenue Code (Title 26 of The United States Code) as that section applied to the taxable year 1941 so far as pertinent * to this matter reads as follows:

. . . Amounts received as an annuity under an annuity . . . contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity . . . until the aggregate amount excluded from gross income under this chapter ** or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. . . .

* For the convenience of the Court, section 22 (b), as that section applied to the taxable year 1941, is set forth in full in Appendix A.

** Chapter 1.

By reason of the portion of the statute just quoted, the validity of the following proposition cannot be successfully questioned:

A decision determining a deficiency of income taxes for the taxable year 1941 is erroneous and should be reversed:

(1) If, in the taxable year 1941, an amount was received as an annuity under an annuity contract;

(2) If a premium or consideration was paid for such annuity.

Since the decision now being reviewed by this Court is a decision of The Tax Court of The United States determining a deficiency of income taxes for the taxable year 1941 (R. p. 40), that decision is erroneous and should be reversed if the two conditions enumerated in the above stated proposition exist.

This argument will seek to establish that said two conditions do exist.

I.

In the Taxable Year 1941 an Amount was Received as an Annuity Under an Annuity Contract

In the taxable year 1941, an amount was received.—That petitioner received an amount from Standard in the taxable year 1941 is not in dispute. It has been properly so held in the findings of fact (R. p. 26).

The amount so received was received as an annuity under an annuity contract.

The agreement under which the amounts were received is within every legal and commonly accepted meaning of the term.—The amount so received was received pursuant

to the agreement of March 22, 1940 (R. pp. 23-26). By the terms of that agreement, Standard agreed to pay petitioner "*a life annuity*" (R. pp. 24-25); petitioner accepted "*this annuity*"; and Anglo paid Standard £89,120 toward the cost of "*the annuity*" (R. p. 25).

Such a contract is an annuity by any definition known either in law or in common parlance.

The agreement of March 22, 1940 was executed by petitioner and Standard at the latter's principal office located at 30 Rockefeller Plaza, New York, New York, and by Anglo at its principal office in London, England. These facts of the execution of the agreement were taken to be true and set forth in a stipulation of facts executed by opposing counsel (R. p. 58). It is submitted that in view of the facts present in this case, the validity of the agreement of March 22, 1940 should be governed by the laws of the State of New York.

Under the laws of the State of New York, the agreement of March 22, 1940 was an annuity contract. Paragraphs 1 and 2 of Section 46 of the New York Insurance Law read as follows:

1. "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured; and optional modes of settlement of proceeds.

2. "Annuities," meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments,

or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of paragraph one.

Since the agreement of March 22, 1940 was an "agreement to make periodical payments," since "the making and continuance of . . . such payments" was "dependent upon the continuance of human life," and since the agreement was not a life insurance contract, the agreement was an annuity contract.

The Tax Court of The United States dismisses the foregoing definition with the statement, "Such law does not control interpretation of section 22 (b)(2)" (R. p. 31). Assuming that the laws of the State of New York do not govern, the fact remains that Congress in enacting section 22 (b)(2) used the word "annuity". In so using that word, Congress must have intended it to have the meaning usually given to it. We submit that the New York definition is the meaning usually given to the word and hence is the meaning intended by Congress. In any event, no other definition which might have been intended by Congress has been suggested.

The respondent's regulations (Section 29.22 (b)(2)-2, Reg. 111) define an annuity as follows:

Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. . . .

The Tax Court of The United States dismisses the respondent's own definition of the term "amounts received as an annuity under an annuity contract" by saying "The regulation does not say that every periodic payment is annuity" (R. p. 31). But the regulation *does* say that "amounts received in periodical installments . . . monthly . . . for life, and which installments are payable or may be payable over a period longer than a year" are within the term "amounts received as an annuity under an annuity . . . contract." Since the amounts received by petitioner were "amounts received in periodical installments . . . monthly . . . for life", and since such "amounts" were "payable or" might "be payable over a period longer than a year", such amounts are "amounts received as an annuity under an annuity . . . contract" within respondent's own definition of the term. The Tax Court's disregard of the definition in the regulations is about as logical as would be the refusal to concede that a red headed man is an animal because the definition "animals include men having hair" does not assert positively that all men are animals.

We may concede without injury to our cause that the respondent's definition of an annuity is not a very good one. An opinion of one of the respondent's legal advisers contains a better one:

In Solicitor's Opinion 160 (C. B. III-2, 60) the then Solicitor of Internal Revenue stated:

" . . . An annuity is defined in the following manner by Coke: 'An annuity is a yearly payment of a certaine summe of money granted to another in fee for life or yeares, charging the person of the grantor onlye.' (Coke's Littleton 144b (quoted with approval in Kent's Commentaries (14th edition), Part VI, page 460); Bouvier's Law Dictionary (Nalle 3d revision), 201.) However, the term has come to have

a somewhat broader meaning, and designates a fixed sum, granted or bequeathed, payable periodically, but not necessarily annually, subject to such specific limitations as to its duration as the grantor or donor may lawfully impose. (3 Corpus Juris, 200.) The essential element is the certainty of the amount to be paid periodically at a certain rate per annum or in a certain aggregate annual amount. (*Peck v. Kinney*, 143 Fed., 76, 80.) It was said by the Supreme Court of the State of Ohio in the case of *Chisholm v. Shields* (67 Ohio State 374, 66 N. E., 93, 94) that ‘an annuity, as understood in common parlance, is an obligation by a person or a company, to pay to the annuitant a certain sum of money at stated times during life, or a specified number of years, in consideration of a gross sum paid for such obligation.’ An annuity, then, is a stated sum payable periodically at stated times during life, or a specified number of years, under an obligation to make the payments in consideration of a gross sum paid for such obligation. . . .”

The amounts received by petitioner from Standard were amounts received as annuities under an annuity contract within the definitions of Lord Coke, of Chancellor Kent, of Bouvier, of Corpus Juris, of *Peck v. Kinney*, *supra*, and of *Chisholm v. Shields*, *supra*. Finally they are within the meaning of that term as defined by the Solicitor of Internal Revenue. Each such amount was “a stated sum payable periodically at stated times during life . . . under an obligation to make the payments in consideration of a gross sum paid for such obligation.”

The reasoning of The Court below.—The Court below concluded that the amounts received by petitioner from Standard were not amounts received as an annuity under an annuity contract because (1) the contract of March 22, 1940 “was not, in form, any usual commercial annuity” (R. p.

29); and (2) the amounts were received as a pension for services rendered.

We will discuss below, in the order stated above, the reasons of the Court below for deciding that the amounts received by petitioner from Standard were not amounts received as an annuity under an annuity contract.

The fact that the contract of March 22, 1940 was not a commercial annuity contract is immaterial.—In *Gillespie v. Commissioner of Internal Revenue* (128 F. (2d) 140) this Circuit Court stated:

“ . . . That the contract was not labeled ‘annuity contract’ is immaterial. *Bodine v. Commissioner, supra*.^{*} . . . It is likewise immaterial, if true, that the corporation was not authorized by law to make an annuity contract; for, whether authorized or not, such a contract was made and payments thereunder were received by the taxpayer. . . . ”

(See also *Raymond v. Commissioner of Internal Revenue*, 114 F. (2d) 140; *Beattie v. Commissioner of Internal Revenue*, 6 T. C. 609, aff’d 159 F. (2d) 788.)

The reasoning of the Court below that the amounts received by the petitioner from Standard were received as a pension and not as an annuity, is unsound.—While we freely admit that the underlying reason for the making of the contract of March 22, 1940, was the fact that petitioner had rendered services to Anglo and that Anglo was obligated to pay petitioner a pension, the fact remains that, technically, Anglo satisfied that obligation by paying £89,120 to Standard in consideration of Standard’s writing an annuity on petitioner’s life. A pension for services rendered is paid by the employer. Anglo, which had an obligation to pay such a pension, satisfied that obligation.

^{*} 103 F. (2d) 982.

Standard, which had no such obligation, received £89,120 from Anglo and agreed to pay petitioner, not a pension but an annuity. The record amply supports the above stated conclusions.

Before going to England petitioner had expected to be entitled to participate in Anglo's superannuation scheme (R. p. 61). After he arrived in England he found that he was not entitled to participate in that plan and that the plan was not in good financial condition (R. pp. 63, 65). It was also obvious that petitioner, had he been eligible under that plan, would, after a given period, say 10 years, of service with Anglo, have been entitled to a pension of only £2,200, based on his salary of £11,000.

Petitioner discussed these matters with Standard and with other executives of Anglo.

The *only* results of the conversations with Standard were that it was decided that "this question is to be deferred until the Anglo-American Oil Company has revised its annuity plan" and that it was recognized that if the proposed revision of Anglo's plan did not "fully take care of Mr. Wolfe's case" "the matter will have to be given special consideration at the proper time" (R. pp. 18, 80-81).

On the other hand, in the discussion with other executives of Anglo, in addition to an agreement being reached that petitioner would be considered on the same basis as those who were entitled to participate in Anglo's superannuation scheme (R. pp. 17, 64), it was further agreed that petitioner was to be treated as if he had been in the employ of Anglo from June 1902 (R. pp. 19, 64). These agreements were embodied in the resolution of October 22, 1931 (R. pp. 19, 64, 67), which resolution not only established Anglo's obligation to pay petitioner a pension but

fixed the formula by which the amount of that pension was to be determined.

When in 1939, as the result of the advice of petitioner's physician that he live in America (R. pp. 65-66), he began giving thought to retiring and requested of Anglo that his pension be payable in dollars, it was an executive of Anglo who, for the first time, suggested the possibility of Anglo's satisfaction of its obligation to pay a pension to petitioner by purchasing an annuity from Standard (R. p. 66).

This suggestion led to discussions with, but not to immediate acquiescence by, Standard. On June 16, 1939 an executive of Standard wrote "the problem of paying your annuity . . . at this end has been left for future consideration" (R. pp. 87-88).

On June 21, 1939, an employee of Standard wrote an executive of Standard: "If the retirement goes through you might wish to give consideration to having the payments made from New York *with a periodic billing of Anglo*. It might turn out to be to the company's benefit to handle the matter under such an arrangement if Mr. Wolfe is in poor health" (R. p. 91). This suggestion was the direct opposite of the purchase of annuity by Anglo for petitioner. Had this plan been adopted Anglo would have continued to be liable for petitioner's pension as long as petitioner lived. The same observations are true of the proposals "subject to proper approval" in the memorandum of June 29, 1939 (R. pp. 20, 21, 82-83) (see page 12 herein). Had Anglo, in accordance with that proposal, transferred to Standard "for deposit to the sub-account for assigned expatriates in the annuity fund the estimated present value of Anglo's liability," Anglo would not have thereby been relieved of any liability. It would merely have been paying a pension.

It is obvious, however, that Anglo wanted no such arrangement. It wanted no uncertain future liability for a pension for the duration of petitioner's life. On August 4, 1939, the executive of Anglo who had originally suggested the purchase of the annuity from Standard, wrote: "it seems to us that by far the best method of dealing with the matter is to embody the arrangement in a simple three-party agreement. . . . Our actuary advises us that the capital liability of the amount of annuity if payable as from 1st January 1940 works out at £88,049 and the present value of this as at 1st September 1939 is £87,177." On August 22, 1939, Anglo remitted the said sum of £87,177. On January 12, 1940, an executive of Standard wrote an executive of Anglo: "When I wrote you the other day, I failed to realize that you have a three-corner agreement between Standard Oil of New Jersey and Mr. Wolfe, *as a means of insuring that Anglo had discharged its liability for any pension payments to Mr. Wolfe*" (italics supplied) (R. p. 85). On March 22, 1940, in transmitting the agreement of that date to Anglo, an executive of Standard wrote: "We believe, nevertheless, that the revised agreement accomplishes *the protection for Anglo* which you sought in your draft of the agreement." (R. p. 96).

It is thus apparent that in the beginning of the 1939 negotiations Standard sought to act as a mere conduit by which Anglo would, throughout petitioner's life, satisfy its obligation to pay him a pension, and that Standard finally acquiesced in Anglo's proposal that Standard accept £89,120, agree to pay petitioner an annuity, and entirely relieve Anglo of further liability for the payment of a pension to petitioner. The agreement of March 22, 1940, did precisely that.

" . . . 1. . . . Standard . . . hereby covenants to pay Mr. Wolfe a life annuity . . . " (R. p. 24).

- “3. In consideration of Mr. Wolfe’s valuable services to . . . Anglo . . . , Anglo . . . has paid to . . . Standard . . . , as a contribution toward the cost of the annuity settlement, the sum of £89,120-0-0, the receipt of which sum . . . Standard . . . doth hereby acknowledge.
4. In consideration of the aforesaid payment . . . Standard . . . hereby indemnifies and for all time agrees to keep indemnified . . . Anglo . . . from and against any liability which . . . Anglo . . . might otherwise have had to Mr. Wolfe in respect to a pension” (R. p. 25).

The Court below supports its decision by arguing that Standard, in entering into the agreement of March 22, 1940, was merely fulfilling a guarantee it had made to petitioner in 1931, that it is, in paying the annuity, merely fulfilling its own obligation to pay petitioner a pension, and that Anglo merely made a contribution toward the cost of the annuity by which that pension was paid.

The position of the Court below is untenable in at least two respects:

In the first place, it should not make the slightest difference in the ultimate decision of this case whether Standard guaranteed petitioner’s pension in 1931, whether Standard was or is obligated to pay petitioner a pension, and whether Anglo paid all of the cost or merely made a contribution to the cost of the annuity.

In *Brodie v. Commissioner of Internal Revenue*, 1 T. C. 275, a corporation purchased for the taxpayer a paid-up *retirement annuity as additional compensation for services rendered*. The Tax Court properly held that the cost of the annuity was taxable income to the taxpayer. Com-

menting on the treatment to be accorded the future annuity payments for income tax purposes, the Court said:

“If and when petitioners begin to draw their annuities, assuming that the law remains what it now is, they will receive a tax benefit from the compensation payments with which they are now being taxed. *For example, section 22 (b)(2) of the Internal Revenue Code reads in part as follows:...*” (Italics supplied.)

To the same effect is *Freeman v. Commissioner of Internal Revenue* (4 T. C. 582, on appeal C. C. A., 2), where the Court said:

“... Payments under the annuity contracts may be reported properly under section 22 (b) (2) ...”

In the instant case let us assume that the premises of the Court below are correct, that Standard did guarantee the petitioner's pension, that Standard did have an obligation to pay a pension to petitioner, and that Anglo merely made a contribution to the cost of the annuity. Even with these assumptions it cannot be denied that Anglo also had an obligation to pay petitioner a pension. Suppose Standard, instead of being an oil company, had been an insurance company owning all of the stock of Anglo, and having the obligations to petitioner which the Court below assumes. If, under these circumstances, Anglo had paid Standard £89,120 in consideration of Standard's agreement to pay petitioner an annuity and to indemnify Anglo from any further claims from petitioner for pension, would the arrangement be any the less an annuity? The only difference which we have assumed in making this argument is that Standard is not an insurance company, and, as we have already seen, the fact that Standard is not an insurance company is immaterial. (See page 52, herein.)

In the second place, the Court's premises are incorrect.

Standard did not guarantee the payment of petitioner's pension. It is true that the preamble to the agreement of March 22, 1940, recites that petitioner undertook the assignment with Anglo "on the understanding that if he were eventually retired from the service of the Anglo company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo company as in effect on the date of retirement and that payment of such sterling pension would be guaranteed by the Standard company in dollars at an exchange rate of five dollars to the pound." (R. pp. 23-24).

Petitioner testified, however, that in none of the conversations he had prior to going to England was the question of his retirement pay in the event of his eventual retirement ever mentioned (R. p. 61); that Standard did not guarantee the payment of his retirement pay (R. pp. 73-74); and that the "understanding" referred to in the preamble to the agreement of March 22, 1940, was "my understanding. I had not discussed the matter with any official of Standard Oil Company of New Jersey or the Imperial Oil Company, Ltd." (R. p. 61).

The agreement of March 22, 1940, was drawn by an executive of Standard, and no doubt stated as premises what were in fact the state of mind of the parties after the negotiations leading up to that contract were concluded. In any event there is ample evidence in the record to support the petitioner's testimony.

In 1931 petitioner was a Canadian citizen (R. pp. 5, 13, 16) who had always lived in Canada (R. p. 16). He was contemplating taking a position of indefinite duration in England. Why, even if he had thought of demanding that his retirement pay, in the event of a then un contemplated retirement, be guaranteed by Standard, should he have de-

manded that it be paid in dollars? The record is clear that the idea of payment in dollars arose *in 1939*, as the result of the advice of petitioner's physician that petitioner live in California (R. pp. 65-66). It was as the result of this advice that petitioner *in 1939* made the request for payment in dollars.

That Standard did not *in 1931* guarantee the payment of petitioner's retirement pay, in dollars or in any other way, is indicated by other facts in the record.

1. There was no writing to indicate that petitioner was being offered a position by Anglo (R. pp. 74-75). Assuming that Standard made the alleged guarantee it was wholly unenforceable.

The New York law is as follows:

New York Personal Property Law. Section 31.
Agreements required to be in writing.

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;

* * * * *

2. Is a special promise to answer for the debt, default or miscarriage of another person; * * *

See also:—

Union Properties v. Bogdanoff (250 App. Div. 282);

Rosenkranz v. Schreiber Brewing Co. (287 N. Y. 322);

Terminello v. Bleecker (155 Misc. 702);

Witschard v. A. Brody & Sons (257 N. Y. 97);

Bulkley v. Shaw (289 N. Y. 133).

2. Petitioner assumed that he would be eligible to participate in the superannuation scheme of Anglo (R. p. 61). It was not until he found that he was not in fact so eligible that he raised the question (R. pp. 63, 65). Is it reasonable to suppose that, feeling that he was adequately protected, he would have asked for guarantees?

3. In the discussions which petitioner had with an executive of Standard following the suggestion made by an executive of Anglo that Anglo purchase an annuity from Standard, the executive of Standard asked what rate of exchange petitioner would want (R. p. 67). On June 16, 1939, the same executive of Standard wrote: "The problem of paying your annuity in dollars at this end has been left for future consideration" (R. pp. 87-88). All of this is inconsistent with the idea that Standard had at any prior time guaranteed the payment of petitioner's pension in dollars at \$5.00 to the pound. So also is the memorandum accompanying the letter of June 16, 1939 which gave "the amount of annuity" due petitioner, assuming his retirement on various dates *in pounds, not in dollars* (R. p. 89). Again the memorandum of June 21, 1939, gave the annuity, this time in dollars, but converted, not at \$5.00 to the pound but at \$4.68 to the pound. In the same memorandum it was suggested that consideration be given "to having payments made by New York with a periodic billing to Anglo" (R. p. 91). The idea of a periodic billing to Anglo was certainly inconsistent with the idea that Standard had any then existing obligation to pay petitioner's pension. If Standard had *in 1931* guaranteed the payment of petitioner's pension at \$5.00 to the pound, why *on June 29, 1939*, was the payment of the annuity "by New York in dollars, converted at the rate of \$5.00 to the pound" (there was incidentally no mention made of any guarantee other than "any cost incurred in New York by reason of a sterling rate less than \$5.00 would be

absorbed by Jersey'') "subject to proper approval"? (R. pp. 81-83.) If it had been guaranteed, it needed no approval. Finally, the letter of January 9, 1940 (R. pp. 22-23) announces, as if it were something *new*: "We have undertaken to guarantee Mr. Wolfe, etc." *

The Court below argues that Standard must have had an obligation to pay all or a part of petitioner's pension because the pension was in part based on years of service rendered by petitioner before he entered the employ of Anglo. There is not a shred of evidence that the arrangement evidenced by the resolution of October 22, 1931, whereby petitioner was to be considered to have been in the employ of Anglo since 1902, was ever discussed with Standard. That was a contractual arrangement between Anglo and petitioner with which Standard had nothing to do. Petitioner simply made a request which was agreed to by Anglo.

Anglo did not merely make a contribution to the cost of petitioner's pension. Anglo paid Standard the full cost of that pension computed on an actuarial basis. As a result of the resolution of October 22, 1931, Anglo was obligated to pay petitioner, assuming his retirement on July 1, 1940, a pension of £7,293 (R. p. 67). If he had retired on January 1, 1940, the amount would have been £7,095 (R. p. 82). **

* This letter in proceeding "that the money which you provided plus the additional amounts which Standard Oil Co. of New Jersey will be required to put up, will be used to assure him the annuity to which he is entitled" was written under a misunderstanding—a misunderstanding which was recognized by the letter of January 12, 1940 (R. p. 85). The fact remains, however, that even the situation as misunderstood is clearly inconsistent with the idea that Standard had theretofore made any guarantee to, or had any liability to, petitioner.

** Incidentally, Standard's pension plan was obviously not identical with Anglo's. In the letter of June 29, 1939, it was said: "We understand that under the agreement with Mr. Wolfe, he is to receive, upon retirement, a life annuity calculated in accordance with the Anglo Plan and their discount absorption program (*the latter* being identical to ours)." In other words, the former, the plan, was not identical.

In the letter of August 4, 1939 (R. pp. 83-84) it was stated: “*Our actuary* advises us that the capital liability of the amount of annuity if payable as from *1st January 1940* works out at £88,049, and the present value of this as at 1st September 1939 is £87,177.” Anglo paid said £87,177 in August 1939, thus paying the full then value of the capital liability on the assumption petitioner was to retire on January 1, 1940. Instead of retiring on that date, petitioner retired on July 1, 1940, so that the payment of £87,177 was not enough. Therefore an additional £1943 was paid.

The only contribution Standard will ever have to make will be made if petitioner survives his expectancy of life. Every writer of every annuity takes the risk that the annuitant will live longer than expected.

Hooker v. Hoey (27 Fed. Supp. 489, aff’d 107 F. (2d) 1016) is not a precedent for a decision adverse to the petitioner.—The Court below rests its decision that the amounts received by petitioner from Standard were not amounts received as an annuity under an annuity contract on the authority of *Hooker v. Hoey* (27 Fed. Supp. 489, aff’d 107 F. (2d) 1016).

The taxpayer in the *Hooker* case had been an employee of Vacuum Oil Co. He became entitled to receive a pension from Vacuum and actually received a pension paid by Vacuum for a period of time. This was clearly no “contract of annuity.” It was the situation which would have existed had petitioner received his pension from Anglo. Thereafter, Vacuum was succeeded by Standard Oil Co. of New York. Standard Oil Co. of New York became possessed of all the assets, and assumed all the liabilities, of Vacuum. The pensioner attempted to spell out a “contract of annuity” on the theory that when Vacuum transferred all its assets to Standard Oil Co. of New York and the latter assumed the

liability for the pension, along with all the other liabilities of Vacuum, Vacuum had purchased an annuity for the pensioner from Standard Oil Co. of New York.

Any analogy to the instant case is, to say the least, strained. In the *Hooker* case there was no contract of annuity either when the pension was granted or when the merger of the two corporations occurred. In the instant case, Anglo paid Standard the then value, computed actuarially, of the capital liability it had incurred to petitioner. Standard, specifically in consideration of such payment, bound itself to pay petitioner an annuity. Anglo was relieved of and indemnified against liability for all time. This we submit was no mere substitution of Standard for Anglo; it was a contract of annuity and the amounts received by petitioner were "amounts received under a contract of annuity."

II.

A Premium or Consideration of \$415,786.75 Was Paid for Such Annuity

That Anglo paid Standard £89,120 or \$415,786.75 (R. p. 26) and that Standard "agreed to accept the aforesaid £89,120-0-0 from The Anglo Company and to pay Mr. Wolfe a life annuity" (R. p. 24) can not be questioned.

Was such payment "the aggregate premiums or consideration for such annuity"?

It has been repeatedly and uniformly held that the entire cost or purchase price of the annuity, when purchased by an employer for an employee as additional compensation, is includible in the gross income of the annuitant in the year of purchase and recovered by the annuitant under the method prescribed in section 22 (b)(2) of the Internal Revenue Code.

In *Brodie v. Commissioner of Internal Revenue* (1 T. C. 275) a corporation purchased for the taxpayer a paid-up retirement annuity as additional compensation for services rendered. The petitioner had no right to a cash payment in lieu of the annuity, the policy could not be assigned, nor was there any cash surrender feature. The respondent proposed a deficiency in income taxes based upon the determination that the purchase price of the annuity was includible in gross income in the year of purchase. The Court, holding for the respondent, stated:

“The Board said in *N. Loring Danforth, supra*,* ‘That the purpose, plan and effect was to give petitioner this additional compensation for his services is manifest. The benefit was directly to him, and the corporation received no more benefit than any employer derives when it increases the compensation of its employee. . . .’

“The facts being what they are, we can see no distinction in principle from the issue involved in the instant proceedings and that which was involved in the above cited cases. It seems to us that our decision must be the same. . . .”

As to the recovery of the cost of the annuity, the Court said:

“ . . . If and when petitioners begin to draw their annuities, assuming that the law remains what it now is, they will receive a tax benefit from the compensation payments with which they are now being taxed. For example, section 22(b)(2) of the Internal Revenue Code reads in part as follows: . . . ”

In other words, the Court held that the amount paid by the employer was “the aggregate premiums or consideration paid for such annuity” within the meaning of section 22(b)(2).

* 18 B. T. A. 1221.

The Tax Court of The United States and the Circuit Court of Appeals reached the same conclusions in *Freeman v. Commissioner of Internal Revenue* (4 T. C. 582, on appeal C. C. A.-2); *Hackett v. Commissioner of Internal Revenue* (5 T. C. 1325, aff'd 159 F. (2d) 121, C. C. A.-1); *Oberwinder v. Commissioner of Internal Revenue* (147 F. (2d) 255, C. C. A.-8, aff'g T. C. Memo. April 26, 1944); *Hubbell v. Commissioner of Internal Revenue* (150 F. (2d) 516, C. C. A.-6, aff'g 3 T. C. 626); and *Ward v. Commissioner of Internal Revenue* (159 F. (2d) 502, C. C. A.-2, aff'g T. C. Memo. November 29, 1945).

In the *Hackett* case, *supra*, The Tax Court said:

“ . . . Furthermore, we specifically held in *William E. Freeman, supra*, that the cost (\$71,339.20) of the annuity contracts there involved which had been purchased to compensate Freeman was income to him in 1939, when the contracts were received, and that ‘Payments under the annuity contracts may be reported properly under section 22 (b)(2), and for that purpose \$71,339.20 will represent their cost.’ In other words, in the *Freeman* case we construed the words ‘aggregate premiums or consideration paid for such annuity’ to include payments by others on behalf of the annuitant in the form of compensation as well as by the annuitant himself. . . . ” (Italics supplied.)

As to the treatment of the amounts received by the annuitants The Tax Court said in the *Ward* case, *supra*:

“Section 22 (b)(2) of the Internal Revenue Code provides that income from annuity payments in excess of 3 per cent of the consideration paid shall be excluded from gross income until the aggregate amount excluded from gross income equals the aggregate premiums or consideration paid for the annuity; in other words, that up to the amount of the consideration paid the petitioner will not be taxed upon the

annuity payments . . . except to the extent of 3 per cent of the aggregate premiums or consideration paid for the annuity. . . . ”

The *only* differences between the instant case and the cited cases are: In the cited cases the annuities were purchased from insurance companies (which, as we have seen—see page 52 herein—is immaterial), and in the cited cases the annuitant paid income taxes to The United States on the aggregate premiums or consideration paid for the annuity. The Court below rests its opinion in this respect on the latter difference, citing *Jones v. Commissioner of Internal Revenue* (2 T. C. 924).

We concede that the petitioner paid no income tax to The United States in 1940 based upon the inclusion in his gross income of the purchase price of the annuity. However, when the consideration for the annuity was paid, petitioner was a non-resident alien (R. p. 16) and as such was not required by law to pay any income tax to The United States. However, it cannot be doubted that if the petitioner had been a resident of The United States he would have been taxable on the purchase price of the annuity under the rule laid down in the *Brodie* line of cases. The inquiry therefore resolves itself into this: Is a receipt income because of its nature, as we contend, or is it income because an income tax has been paid upon it, as the Court below reasons? An income tax is a mere incident to income; the fact of the income tax does not make an item income. Its nature makes it income, and because it is income, the income tax attaches.

Under the rationale of the *Brodie* line of cases, the payment by Anglo to Standard was *by its nature* income. The fact that the petitioner's status at the time as a non-resident alien prevented the imposition of the tax, is immaterial.

We frankly do not know whether the payments made by Anglo to Standard would have been considered income under the English income tax laws. We do know that petitioner was not advised by the solicitor, who prepared his returns and who knew the facts, to report it (R. p. 77), but even if we assume that it was not taxable in England, we submit that we are here considering an American, not an English, statute. It was income under our law, and that is all that is material. In England, capital gains are not taxed. Let us suppose that an Englishman, living in England, exchanges the stock of Corporation A which cost him \$100, not in a corporate reorganization, for stock of Corporation B having a value of \$200. Under English law, the gain of \$100 is not taxed. Had our Englishman been a resident of The United States when he made the exchange the \$100 would have been taxable. Will it be seriously argued, that if he becomes a resident of The United States, bringing the B stock with him, his basis for determining gain or loss on a sale of the B stock in The United States is anything other than the \$200—its value when he received it? We think not. It is American law that governs.

CONCLUSION

The decision of The Tax Court of The United States should be reversed.

Dated: Los Angeles, California,
January 12, 1948.

Respectfully submitted,

WILLIAM GALBALLY, JR.,
510 South Spring Street,
Los Angeles 13, California.
Counsel for Petitioner.

Of Counsel:

JAMES O. WYNN.

APPENDIX A

Section 22 (b) of the Internal Revenue Code (Title 26 of The United States Code):

Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter: *

(2) *Annuities, Etc.*—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph. The preceding sentence shall not apply in the case of such a transfer if such contract or interest therein has a basis for determining gain or loss in the hands of a transferee determined in whole or in part by reference to such basis of such contract or interest therein in the hands of the transferor.

* Chapter 1.

No. 11713

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

FREDERICK JOHN WOLFE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

**SEWALL KEY,
GEORGE A. STINSON,
MORTON K. ROTHSCHILD,**

Special Assistants to the Attorney General.

FILED

MAR 17 1948

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute and regulations involved.....	2
Statement.....	4
Summary of argument.....	14
Argument:	
The payments received by the taxpayer during the taxable year under a contract between his former employer, a third party, and himself represented a pension or compensation for past services and therefore constituted gross income under Section 22 (a) and the applicable Treasury Regulations.....	15
Conclusion.....	25

CITATIONS

Cases:	
<i>Bass v. Hawley</i> , 62 F. 2d 721.....	19
<i>Botchford v. Commissioner</i> , 81 F. 2d 914.....	18
<i>Commissioner v. Smith</i> , 324 U. S. 177, rehearing denied, 324 U. S. 695.....	17
<i>Dobson v. Commissioner</i> , 320 U. S. 489, rehearing denied, 321 U. S. 231.....	21
<i>Fisher v. Commissioner</i> , 59 F. 2d 192.....	19
<i>Hackett v. Commissioner</i> , 159 F. 2d 121.....	24
<i>Helvering v. Butterworth</i> , 290 U. S. 365.....	23
<i>Hooker v. Hoey</i> , 27 F. Supp. 489, affirmed, 107 F. 2d 1016.....	17, 19
<i>Hubbell v. Commissioner</i> , 150 F. 2d 516.....	24
<i>Noel v. Parrott</i> , 15 F. 2d 669, certiorari denied, 273 U. S. 754....	19
<i>Oberwinder v. Commissioner</i> , 147 F. 2d 255.....	24
<i>Old Colony Tr. Co. v. Commissioner</i> , 279 U. S. 716.....	17
<i>Ward v. Commissioner</i> , 159 F. 2d 502.....	24
<i>Weagant v. Bowers</i> , 57 F. 2d 679.....	19
<i>Wilmington Co. v. Helvering</i> , 316 U. S. 164.....	22
Statute:	
Internal Revenue Code, Sec. 22 (26 U. S. C. 1940 ed., Sec. 22) ..	2
Miscellaneous:	
G. C. M. 14593, XIV-1 Cum. Bull. 50 (1935).....	19, 23
I. T. 3292, 1939-1 Cum. Bull. 84.....	19
I. T. 3346, 1940-1 Cum. Bull. 62.....	19
1 Mertens, Law of Federal Income Taxation (1942 ed.), Sec. 6.30, p. 283.....	23
Treasury Regulations 45, Art. 32.....	17
Treasury Regulations 62, Art. 32.....	17

Miscellaneous—Continued

	Page
Treasury Regulations 65, Art. 32-----	17
Treasury Regulations 69, Art. 32-----	17
Treasury Regulations 74, Art. 52-----	17
Treasury Regulations 77, Art. 52-----	17
Treasury Regulations 86, Art. 22 (a)-2-----	17
Treasury Regulations 94, Art. 22 (a)-2-----	17
Treasury Regulations 101, Art. 22 (a)-2-----	17
Treasury Regulations 103, Sec. 19.22 (a)-2-----	3, 17
T reasury Regulations 111, Sec. 29.22 (a)-2-----	17

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11713

FREDERICK JOHN WOLFE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in the present case is that of the Tax Court (R. 14-40), which is reported in 8 T. C. 689.

JURISDICTION

This petition for review (R. 41-44) involves federal income taxes for the year 1941. On December 11, 1944, the Commissioner of Internal Revenue mailed to the petitioner a notice of deficiency for the year 1941 in the amount of \$1,101.49. (R. 9-12.) Within ninety days thereafter and on March 5, 1945, the petitioner filed a petition with the Tax Court of the United States for a redetermination of the deficiency under the provisions of Section 272 of the Internal Revenue

Code. (R. 2, 4–8.) The decision of the Tax Court that there was a deficiency for the year 1941 in the amount of \$1,101.49 was entered on April 1, 1947. (R. 40.) The case is brought to this Court by a petition for review filed on June 25, 1947 (R. 41–44), pursuant to the provisions of Sections 1141–1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the payments received by the taxpayer during the taxable year 1941 under a contract between his former employer, a third party, and himself as compensation for past services constituted gross income under Section 22 (a) of the Internal Revenue Code and the applicable Treasury Regulations.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) [as amended by Section 1 of the Public Salary Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * *

(2) *Annuities, Etc.*—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. * * *

* * * *

(26 U. S. C. 1940 ed., Sec. 22.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.22 (a)-2. *Compensation for personal services.*—Commissions paid salesmen, compen-

sation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients * * *.

STATEMENT

The facts as found by the Tax Court (R. 16-26) are substantially as follows:

The taxpayer is an individual and filed an income tax return for the year 1941 with the Collector of Internal Revenue for the Sixth District of California. The taxpayer is a citizen of Canada. From his birth in 1879 to 1931 he was a resident of Canada, and from 1931 to October 4, 1941, prior to coming to the United States, he was a resident of England. (R. 16.)

In 1902 the taxpayer entered the employ of the Queen City Oil Company, Ltd., a Canadian corporation, which company in 1911 or 1912 was absorbed by the Imperial Oil Company, Ltd. (hereinafter referred to as Imperial), a Canadian corporation. The taxpayer continued in the employ of Imperial until March 1, 1931. The stock of Imperial was largely held by the Standard Oil Company of New Jersey (hereinafter referred to as Standard). (R. 16.)

Two or three months prior to March 1, 1931, the taxpayer was requested by the senior vice president of Imperial to go to England and take over the duties of the managing director of the Anglo-American Oil Company, Ltd. (hereinafter referred to as Anglo), an

English corporation. On March 1, 1931, the taxpayer became managing director, and later in 1931, chairman, of the board of Anglo. Anglo was stock controlled by the Standard Oil Export Corporation, which, in turn, was stock controlled by Standard. (R. 16-17.)

Prior to March 1, 1931, the taxpayer had conversations with officers of both Standard and Standard Oil Export Corporation to obtain knowledge of the background of Anglo. The amount of salary that he was to receive from Anglo was discussed between the taxpayer and the senior vice president of Imperial. It was the understanding when the taxpayer undertook the assignment of chairman and managing director of Anglo, at the request of Standard, that if he was eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo in effect on the date of retirement and that payment of such pension in sterling would be guaranteed by Standard in dollars at an exchange rate of \$5 to the pound. Before the taxpayer went to England he knew that Anglo had a scheme or plan in existence for paying its retired employees. The taxpayer did not know much about the actual details at that time, but he knew that the basis of the plan was as follows: An employee was entitled on retirement to roughly 2% per year of service, based on a maximum of 75%, and the average of the last five years' pay. Retirement at 60 for one who had the full 37½ years of service would be about 66.3%. (R. 17.)

After the taxpayer went to England, and prior to October 22, 1931, he discussed with the executives of Anglo the question of payments to be made to him in the event of his retirement from the services of that company. The taxpayer told them very "plainly" that he wanted to be considered on the same basis as those who were under the superannuation plan. On August 20, 1931, J. W. Myers, then secretary of Standard's committee on annuities and benefits, wrote D. L. Harper, in charge of foreign sales for Standard, as follows (R. 18):

Mr. D. L. HARPER,
Building.

DEAR MR. HARPER: In reply to your letter of August 14th, regarding Mr. F. J. Wolfe's service record, this will confirm our conference with Mr. Wolfe the other day to the effect that this question is to be deferred until the Anglo American Oil Company has revised its Annuity Plan. This decision is based on the probability that any such Plan will fully take care of Mr. Wolfe's case. Of course, if it does not, the matter will have to be given special consideration at the proper time.

Very truly yours,

(s) J. W. MYERS,
Secretary.

JWM: G

(Notation) 11/29/33

Anglo is to adopt service credit rules basically the same as those of S. O. Co. (N. J.), with such additions as will care for employees of their own subs. Follow this point when plan is in final shape.

After some discussion, it was decided that the taxpayer was to be treated as if he had been in the employ of Anglo from the date in June, 1902, when he was first employed by the Queen City Oil Company, Ltd. The board of directors of Anglo passed a resolution to that effect on October 22, 1931, which reads as follows (R. 19) :

Resolved, it being part of the arrangement with Mr. Wolfe on his joining the Board of this Company, and becoming Managing Director, that for the purpose of calculating pension payable by this Company to him, his services shall be deemed to commence from June, 1902, on which date he joined the Queen City Oil Co., Ltd., (which was subsequently absorbed by the Imperial Co., Ltd., of Canada) and that he be entitled to pension on the same basis as employees benefiting under the Company's Superannuation Scheme dated 31st December, 1925, or any subsequent modification thereof.

In 1939 the taxpayer informed Anglo that he wished to retire and live in the United States and that he wished his "annuity" to be paid in United States dollars at \$5 to the pound. Discussions were had with officials of Anglo and of Standard to this end. Various procedures for paying the taxpayer were discussed by Standard, Anglo, and the taxpayer. Among them was a proposal to purchase an annuity for the taxpayer from a commercial insurance company. This proposal was never accepted or put into effect (R. 19).

Under date of June 21, 1939, one of the staff on Standard's committee on annuities and benefits fur-

nished to F. W. Pierce, executive assistant to the president of Standard, a memorandum, in pertinent part, expressing doubt whether a purchase of such a large amount could be made from an insurance company, and that Equitable had indicated that they would, if asked to write such a contract, have to think it over; also enclosing a table showing "approximate capital value of Mr. Wolfe's annuity," assuming retirement at July 1, 1940, to have a "total cost" of \$467,165, for an annuity of \$34,131 (based on exchanges at \$4.68 on June 20, 1939). (R. 20.)

Under date of June 29, 1939, F. W. Pierce wrote T. C. McCobb, a member of the board of directors of Standard, on the subject "Retirement of F. J. Wolfe," stating, in part, as follows (R. 20-21):

We understand that under the agreement with Mr. Wolfe, he is to receive, upon retirement, a life annuity calculated in accordance with the Anglo Plan and their discount absorption program (the latter being indential to ours), the annuity to be payable in the United States in dollars converted at the rate of \$5.00 to the pound. * * *

The procedure which is to be followed in respect of payment and transfer of funds has been discussed with Mr. Wolfe and we find that it presents some problems. However, subject to proper approval, it is proposed that the annuity be paid by New York in dollars, converted at the rate of \$5.00 to the pound. In view of the uncertainties of the future and in order to assure that the necessary funds be

available here when needed, it is further proposed that Anglo transfer to S. O. Co. of N. J. for deposit to the subaccount for assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability, assuming retirement as of January 1, 1940, computed on a 3% interest basis and discounted for mortality but not for labor turn-over due to any other cause. This transfer would be dollars at the rate of exchange prevailing at the time of payment. If retirement occurs at a later date, Anglo would make the necessary additional capital contribution. In the event of Mr. Wolfe's death prior to retirement, the capital contribution plus 3% interest, compounded annually, would be returned to Anglo unless the pension had meanwhile been insured in which event, the premium refund, if any, would be determined in accordance with the provisions of the insurance contract under which it was purchased. Any cost incurred in New York by reason of a sterling rate less than \$5.00 would be absorbed by Jersey and charged to such account as may be later determined. The Anglo sterling pension capital contribution would possibly not be a deductible item for income tax purposes so far as concerns Anglo.

A table set forth in the letter showed the "annual annuity" assumed effective July 1, 1940, to be \$36,465 (dollars at \$5 per pound) and \$34,131 (dollars at \$4.68). (R. 22.)

Under date of August 4, 1939, R. A. Carder, an official and secretary of Anglo, in charge of finances,

wrote Frank Pierce, "Annuities & Benefits Dept.," a letter, stating in part, as follows (R. 22):

* * * the procedure [retirement of F. J. Wolfe] proposed entails obligations on all three parties affected and is of considerable importance, it seems to us that by far the best method of dealing with the matter is to embody the arrangement in a simple three-party agreement.

Pencil notations appear at the bottom of the letter as follows (R. 22):

£87,177 at 4.68—408,988; at 5.00—435,885.
Group Annuity * * *, our estimated cost
at 3%—491,000. Without loading 451,000.

A letter from an official of Standard to R. A. Carder, an official of Anglo, under date of January 9, 1940, indicated that final arrangements had been made, satisfactory to the taxpayer, so that his retirement would become effective July 1, 1940. (R. 22.) The letter contained, in part, the following (R. 22-23):

Final arrangements have been made, satisfactory to Mr. Wolfe, so that his retirement will become effective July 1, 1940. Although our formal setup for taking care of the annuity is not completed, we have undertaken to guarantee Mr. Wolfe that the money which you have provided, plus the additional amounts which Standard Oil Co. of New Jersey will be required to put up, will be used to assure him the annuity to which he is entitled, and there is no reason, therefore, why you should not formally record the transaction.

It was ultimately decided to handle the matter by having Anglo transfer to Standard the present value of Anglo's pension liability to the taxpayer and having Standard pay the taxpayer monthly in dollars. During the time the taxpayer was employed by Anglo his salary was £11,000 per year, and the salary did not vary in the last five years of his service. (R. 23.)

On March 22, 1940, T. W. Pierce wrote R. A. Carder, enclosing three copies of "an agreement of annuity." Reference was made to "Anglo's initial contribution." (R. 23.) The agreement under date of March 22, 1940, referred to in the letter of March 22, 1940, and drawn by an official of Standard, entered into between Anglo, Standard and the taxpayer, reads in pertinent part as follows (R. 23-26):

Whereas, Mr. Wolfe is Chairman and Managing Director of the Anglo Company and on March 1, 1931, undertook this assignment at the request of the Standard Company on the understanding that if he were eventually retired from the service of the Anglo Company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo Company as in effect on the date of retirement and that payment of such sterling pension would be guaranteed by the Standard Company in dollars at an exchange rate of five dollars to the pound.

And Whereas, Mr. Wolfe is to be retired from the service of the Anglo Company on the first day of July, 1940.

And Whereas, the Anglo Company is unable to grant formally an annuity to Mr. Wolfe under its own superannuation scheme or pay

same from its superannuation fund for the reason that such scheme and related fund are not applicable to any person who entered the employ of the Anglo Company subsequent to May 18, 1928.

And Whereas, the Anglo Company desires to recognize Mr. Wolfe's valuable services to the Anglo Company by contributing to the Standard Company a capital sum of £89,1200-0-0 representing the liability which it would have incurred had it granted Mr. Wolfe a sterling pension equivalent to that payable under the superannuation scheme of the Anglo Company.

And Whereas, the Standard Company has agreed to accept the aforesaid £89,120-0-0 from the Anglo Company and to pay Mr. Wolfe a life annuity as hereinafter provided.

Now It Is Hereby Witnessed as follows:

1. That in consideration of the aforesaid understanding with Mr. Wolfe the Standard Company hereby covenants to pay Mr. Wolfe a life annuity of \$3,038.75 per month, effective July 1, 1940, with the understanding that should Mr. Wolfe's present wife, Marguerite W. Wolfe, survive him, monthly payments in the amount of \$3,038.75 each will be continued and paid to her for a period not to exceed twelve months and in no case beyond the date of her death.

2. Mr. Wolfe hereby accepts this annuity settlement as a complete discharge of any and all pension obligations of the Standard Company, the Anglo Company and any other associated companies.

3. In consideration of Mr. Wolfe's valuable services to the Anglo Company, the Anglo Company has paid to the Standard Company, as a

contribution toward the cost of the annuity settlement, the sum of £89,120-0-0, the receipt of which sum the Standard Company doth hereby acknowledge.

4. In consideration of the aforesaid payment the Standard Company hereby indemnifies and for all time agrees to keep indemnified the Anglo Company from and against any liability which the Anglo Company might otherwise have had to Mr. Wolfe in respect to a pension.

5. If Mr. Wolfe shall die prior to July 1, 1940, then the Standard Company will forthwith on the death of Mr. Wolfe being proved to their reasonable satisfaction repay to the Anglo Company the £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof with interest thereon at the rate of 3% per annum from the date of payment until the date of repayment.

6. If Mr. Wolfe shall die on or after July 1, 1940, then the Standard Company shall be under no obligation to repay to the Anglo Company any portion of the sum of £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof.

The sum of £89,120-0-0, stated in paragraph 3 of the agreement dated March 22, 1940, had been paid by Anglo to Standard as follows: £87,177-0-0 on August 22, 1939, which was converted into \$408,097.33 in United States currency at the official rate of exchange on that date, and £1,943-0-0 on December 31, 1939, which was converted into \$7,689.42 in United States currency at the official rate of exchange on that date. The taxpayer had no control over the payments of the £89,120-0-0 by Anglo to Standard in 1939 and he

paid no income tax to England or Canada on those sums. (R. 26.)

The taxpayer retired from the employ of Anglo on July 1, 1940. At this date he was 60 years of age. Beginning with a payment on July 31, 1940, the taxpayer received \$3,038.75 per month down to the date of the trial pursuant to the contract dated March 22, 1940. Standard has withheld income tax from these monthly payments made to the taxpayer. (R. 26.)

The Tax Court decided, in an opinion review by the entire court, that the payments received by the taxpayer were not received as an annuity under an annuity contract, but were received as a pension in consideration of services rendered in prior years. (R. 28.)

SUMMARY OF ARGUMENT

In 1940 the taxpayer retired as an officer of Anglo, a member of the Standard group, after having worked about 38 years for companies that were or later became affiliated with Standard. Anglo, Standard and the taxpayer entered into an agreement whereby the taxpayer was given a pension or allowance of about \$36,000 per year, with a similar amount to his wife for one year after his death. The taxpayer made no contribution during his 38 years of service to any retirement fund. The Internal Revenue Code, the applicable Treasury Regulations, rulings of the Treasury Department, and court decisions, including one involving facts strikingly similar to those in the present case, indicate that pensions or retiring allowances are compensation for past services and therefore

should be included in gross income. Applying that rule to the facts of this case, the pension allowance which the taxpayer received during the taxable year constituted gross income.

The taxpayer argues that the payments in question represented annuity payments under Section 22 (b) (2) of the Internal Revenue Code which includes only part of each annual payment in gross income until the entire premium or cost has been recovered. Since the entire consideration, allegedly \$415,000, had not been recovered in the taxable year, only part of the payments would be considered taxable if Section 22 (b) (2) applied. While there may have been some evidence to indicate that Anglo had purchased an annuity from Standard, the overwhelming weight of the evidence shows that Anglo had merely arranged with Standard to assume its obligations to the taxpayer. The Tax Court found that Anglo had not intended to purchase an annuity. Since there was substantial support for this finding in the evidence, the conclusion is binding on this Court according to the rule laid down by the Supreme Court.

ARGUMENT

The payments received by the taxpayer during the taxable year under a contract between his former employer, a third party, and himself represented a pension or compensation for past services and therefore constituted gross income under Section 22 (a) and the applicable Treasury Regulations

The taxpayer, a Canadian citizen, retired from the employ of Anglo on July 1, 1940. (R. 26.) From 1902 until that time he had been employed by com-

panies affiliated with or controlled by Standard. (R. 16-17.) Anglo, Standard and the taxpayer entered into a contract under date of March 22, 1940, whereby Anglo transferred to Standard £89,120-0-0, which was converted into United States currency in the amount of about \$415,000, and in consideration of such payment Standard agreed to pay the taxpayer for his life \$3,038.75 per month, effective July 1, 1940, and a similar amount to taxpayer's wife, if she survived the taxpayer, for a period not to exceed twelve months after his death. (R. 23-26.) Beginning with a payment on July 31, 1940, the taxpayer received \$3,038.75 per month through the taxable year 1941. Standard has withheld income tax from these monthly payments to the taxpayer. (R. 26.)

The taxpayer came to the United States on October 4, 1941 (R. 16), and filed an income tax return for the year 1941 including about \$3,000 of the total amount, about \$8,800, received from Standard during the period between October 4, 1941, and December 31, 1941. The Commissioner determined that the entire amount of about \$8,800 constituted gross income. (R. 11.) The Tax Court in an opinion reviewed by the entire court upheld the Commissioner. (R. 26-40.)

Section 22 (a) of the Internal Revenue Code, *supra*, provides that gross income ^{includable} compensation for personal service of whatever kind and in whatever form paid. The Supreme Court has construed this section of the statute as being broad enough to include in taxable income any economic or financial benefit conferred on an employee as compensation, whatever the form or

mode by which it is effected. *Commissioner v. Smith*, 324 U. S. 177, 181, rehearing denied, 324 U. S. 695; see also *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716, 729.

Section 19.22 (a)-2 of Treasury Regulations 103, *supra*, provides in part that pensions or retiring allowances are income to the recipients. A similar provision has been in the Regulations for more than 27 years.¹ Since Section 22 (a) has been reenacted in substantially the same form a number of times after the Regulations were first promulgated, the Regulations now have the force and effect of law. *Hooker v. Hoey*, 27 F. Supp. 489, 490 (S. D. N. Y.), affirmed *per curiam*, 107 F. 2d 1016 (C. C. A. 2d).

Hooker v. Hoey, *supra*, is strikingly similar to the present case. In that case the taxpayer was a former employee of Vacuum Oil Company and retired from active service in 1924. By resolution of the board of directors he was awarded, in view of his 30 years of service, the sum of \$937.50 monthly, or \$11,250 yearly

¹ Article 32 of Treasury Regulations 45 (1920 ed.), promulgated under the Revenue Act of 1918, of Treasury Regulations 62 (1922 ed.), promulgated under the Revenue Act of 1921, of Treasury Regulations 65, promulgated under the Revenue Act of 1924, and of Treasury Regulations 69, promulgated under the Revenue Act of 1926; Article 52 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, and of Treasury Regulations 77, promulgated under the Revenue Act of 1932; Article 22 (a)-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, of Treasury Regulations 94, promulgated under the Revenue Act of 1936, and of Treasury Regulations 101, promulgated under the Revenue Act of 1938; Section 19.22 (a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code; and Section 29.22 (a)-2 of Treasury Regulations 111, promulgated under the Internal Revenue Code.

for life. The taxpayer received \$11,250 annually from Vacuum Oil Company during the period from 1924 to 1931. In 1931 Vacuum Oil Company sold all its property to Standard Oil Company of New York, the latter company assuming all obligations and liabilities of the Vacuum Company. From that time forward the Standard Oil Company of New York made the payments to the taxpayer, including the sum of \$11,250 paid in 1933 which the taxpayer claimed were immune from income tax on the ground that it was an annuity.² The court held that the sum in question should have been included in the taxpayer's income for 1933 on the ground that it was a pension or retirement allowance; and that pensions are a form of compensation for personal service which constitute income under Section 22 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and under the applicable Treasury Regulations. The fact that Standard Oil Company of New York took over the Vacuum Company in 1931 and from that time became the payer of the pension was considered immaterial.

This Court has held that additional compensation for past services is taxable income. *Botchford v. Commissioner*, 81 F. 2d 914. Other courts have

² Under Section 22 (b) (2) of the Revenue Act of 1932, c. 209, 47 Stat. 169, none of the amounts received under an annuity contract were treated as income until after the annuitant recovered his premium or other consideration. Under Section 22 (b) (2) of the Internal Revenue Code, *supra*, however, 3% of the total cost of the premium is included in taxable income, and the balance of the annual payments is excluded until the amounts excluded equal the cost of the annuity, after which all of the annual payments are included in gross income.

handed down decisions to the same effect. *Noel v. Parrott*, 15 F. 2d 669 (C. C. A. 4th), certiorari denied, 273 U. S. 754; *Weagant v. Bowers*, 57 F. 2d 679 (C. C. A. 2d); *Fisher v. Commissioner*, 59 F. 2d 192 (C. C. A. 2d); *Bass v. Hawley*, 62 F. 2d 721 (C. C. A. 5th). See also *Old Colony Tr. Co. v. Commissioner*, *supra*. The Treasury Department has repeatedly ruled to the same effect. G. C. M. 14593, XIV-1 Cum. Bull. 50 (1935); I. T. 3292, 1939-1 Cum. Bull. 84; I. T. 3346, 1940-1 Cum. Bull. 62.

Therefore under the statute as construed by the Supreme Court, the Treasury Regulations which have been in effect for more than 27 years, the Treasury rulings, and the decisions, the pension allowance which the taxpayer received in the taxable year, no part of the consideration for which was contributed by him, constitutes gross income as compensation for past services.

The taxpayer contends that the amounts which he received from Standard during the taxable year constituted annuities within the meaning of Section 22 (b) (2) of the Internal Revenue Code (Br. 47-63), and that the sum of \$415,000 was the premium or consideration for the annuity (Br. 63-67). If the taxpayer is correct, only 3% of about \$415,000, that is, \$12,450 per year or \$1,037.50 per month, would be considered as taxable income under Section 22 (b) (2), until the amount excluded from gross income should equal the cost of the annuity, \$415,000. The taxpayer's entire case must rest upon the fact that Anglo paid Standard about \$415,000 in consideration of Standard's promise to pay the taxpayer \$3,038.75

per month, or \$36,465 per year, for the rest of his life and to his wife for one year, if she survived him. If Anglo had made the payments after the taxpayer retired, there would be no factual basis for the taxpayer's argument, and the taxpayer apparently so concedes. (Br. 62.) The taxpayer construes the contract of March 22, 1940, as the purchase of an annuity by Anglo, and contends that he in effect received \$415,000 when this contract was consummated, which represents his cost of the annuity. (Br. 66.) This argument overlooks the fact that the transaction might have been either one of two things: (1) A substitution of Standard for Anglo, in which event the payments were pensions because they were made solely on account of taxpayer's 38 years of service to Standard or to a company affiliated with or controlled by Standard; or (2) the purchase of an annuity in which event the cost of about \$415,000 would have been considered taxable income to the taxpayer in the year of purchase.

While there may have been some evidence to indicate that Anglo had purchased an annuity from Standard, the overwhelming weight of the evidence is to the contrary and shows that Anglo had merely arranged with Standard to assume its obligations to the taxpayer. After weighing the evidence the Tax Court found that Anglo did not intend to purchase an annuity from Standard (R. 38) and that the amounts were received by the taxpayer as a pension for services rendered in prior years (R. 28). If this conclusion is supported by substantial evidence, it is bind-

ing on this Court. *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.

The contract of March 22, 1940, between Anglo, Standard and the taxpayer (part of which is included in the Tax Court's findings of the fact (R. 23-26)) expressly provided in part (R. 23-24):

Whereas, Mr. Wolfe is Chairman and Managing Director of the Anglo Company and on March 1, 1931, undertook this assignment *at the request of the Standard Company* on the understanding that if he were eventually retired from the service of the Anglo Company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo Company as in effect on the date of retirement and that *payment of such sterling pension would be guaranteed by the Standard Company in dollars at an exchange rate of five dollars to the pound.* [Italics supplied.]

This recital shows that the taxpayer undertook his assignment at the request of Standard "on the understanding" that he would receive a life annuity and that payment would be guaranteed by Standard at an exchange rate of five dollars to the pound. This would indicate that Standard was obligated to the taxpayer from the time that he took his position with Anglo in 1931 in regard to a life annuity and that Standard was obliged to pay the annuity if Anglo did not for any reason. More light is thrown on Standard's obligation by the taxpayer's own testimony on cross examination. In regard to his assignment with Anglo after leaving the employ of Imperial, he said (R. 73) "realistically speaking, the offer came

from Standard Oil Company of New Jersey." He also said that when he went to Anglo in 1931, it was not controlled by Standard; but when he retired, the company was wholly owned by Standard. He said that he nominated the board of directors of Anglo, and in all cases his nominations were agreeable to Standard. (R. 72.) If the nominations had not been agreeable to Standard, they could have elected anyone else whom they had chosen. (R. 73.) This testimony indicates that Standard had a much closer interest in the taxpayer's pension than an outside insurance company might have had, and affords a strong reason for the substitution of Standard for Anglo in regard to taxpayer's pension.

The taxpayer also testified that Standard did not guarantee the payment of a retirement allowance to him. (R. 73-74.) Apparently the Tax Court felt that the taxpayer must have been mistaken in this respect, or it decided to give full credit to the recitals in the formal contract which were to the contrary. It is the function of the Tax Court to weigh the evidence and to find the facts where the evidence is in dispute. *Wilmington Co. v. Helvering*, 316 U. S. 164, 168.

Moreover, the documentary evidence in the form of letters, memoranda, etc., shows that from 1931 until the time of taxpayer's retirement in 1940, Standard and Anglo had under consideration the taxpayer's pension or annuity and that the two companies were acting in concert or jointly in this matter. See the letter of August 20, 1931, from Myers of Standard to Harper of Standard (R. 18); the resolution passed

by the board of directors of Anglo on October 22, 1931 (R. 19); memorandum from Standard's committee on annuities dated June 21, 1939, to the executive assistant to the president of Standard (R. 20); letter from executive assistant to the president of Standard to a member of the board of directors of Standard dated June 29, 1939 (R. 20-21); letter from secretary of Anglo dated August 4, 1939, to executive assistant to president of Standard (R. 22); letter from an official of Standard to an official of Anglo, dated January 9, 1940 (R. 22-23); and finally agreement dated March 22, 1940, entered into between Anglo, Standard and the taxpayer (R. 23-26).

All of the evidence described above supports the conclusion of the Tax Court that the agreement of March 22, 1940, between Anglo, Standard and the taxpayer for the payment of the so-called annuity was merely a substitution of Standard for Anglo, and that the transaction did not constitute the purchase of an annuity by Anglo from Standard. The taxpayer paid no premium for this annuity and made no contribution to a retirement fund. His sole consideration was 38 years of service with Anglo and other companies affiliated with or controlled by Standard. The payments of the so-called annuities may have been analogous to annuities but they were not annuities. *Helvering v. Butterworth*, 290 U. S. 365, 369, 370; *Hooker v. Hoey*, 27 F. Supp. 489, 491 (S. D. N. Y.), affirmed *per curiam*, 107 F. 2d 1016 (C. C. A. 2d); G. C. M. 14593, XIV-1 Cum. Bull. 50 (1935); 1 Mertens, Law of Federal Income Taxation (1942 ed.), Section 6.30, p. 283.

If the facts of this case were altered and it appeared that Anglo had used the sum of \$415,000 to purchase an annuity policy from an insurance company, or if it had paid that sum to the taxpayer who in turn purchased the annuity, we would agree that the annual payments received by the taxpayer would have been controlled by Section 22 (b) (2) of the Internal Revenue Code, *supra*. In that event the sum of \$415,000 would have constituted income to the taxpayer at the time of its receipt. *Hackett v. Commissioner*, 159 F. 2d 121 (C. C. A. 1st); *Oberwinder v. Commissioner*, 147 F. 2d 255 (C. C. A. 8th); *Hubbell v. Commissioner*, 150 F. 2d 516 (C. C. A. 6th); *Ward v. Commissioner*, 159 F. 2d 502 (C. C. A. 2d).

Since the taxpayer did not receive the sum of \$415,000, there is no factual basis for a conclusion that the payments made to him after his retirement were made as annuities within the meaning of Section 22 (b) (2). Therefore the payments were made as pensions under Section 22 (a) and the applicable Treasury Regulations. It may be pointed out that if Anglo had in fact purchased an annuity from an insurance company which would pay the annuitant \$36,465 per year, the cost would have been substantially more than \$415,000. The correct figure of the cost of such an annuity was about \$499,000. (R. 37.) Furthermore, there is some doubt whether this cost would cover a joint survivorship annuity which would pay the taxpayer's wife \$36,465 during the year after the taxpayer's death if she survived him. Also, the letter from an official of Standard to an official of Anglo dated January 9, 1940, shows that the tax-

payer's retirement would require the money Anglo provided "plus the additional amounts which Standard . * * * will be required to put up * * *." (R. 22-23.) The Tax Court said that there was no showing that £89,120 were required to cover the taxpayer's retirement, as far as concerned the years of service with Anglo, and ^{that} the evidence indicates otherwise. (R. 36-37.) We [^]believe that the Tax Court correctly characterized this evidence as showing a mere contribution by Anglo to a general fund, rather than the purchase of an annuity. (R. 37.)

CONCLUSION

The decision of the Tax Court is correct and should therefore be affirmed.

Respectfully submitted.

THERON LAMAR CAUDLE,
Assistant Attorney General.

SEWALL KEY,

GEORGE A. STINSON,

MORTON K. ROTHSCHILD,

Special Assistants to the Attorney General.

MARCH 1948.

No. 11713

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

FREDERICK JOHN WOLFE,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

UPON PETITION TO REVIEW A DECISION OF THE TAX COURT
OF THE UNITED STATES

REPLY BRIEF FOR PETITIONER

WILLIAM GALBALLY, JR.,
510 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

Of Counsel:

JAMES O. WYNN,
GEORGE G. BLATTMACHR.

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PAUL F. STUBBS

SUBJECT INDEX

PAGE

Preliminary Statement	1
Reply to Respondent's Argument	1

Table of Cases

Anderson v. Commissioner of Internal Revenue (164 F. (2d) 870, C. C. A. 7)	12
Commissioner of Internal Revenue: Anderson v. (164 F. (2d) 870, C. C. A. 7)	12
Commissioner of Internal Revenue: Credit Bureau of Greater New York v. (162 F. (2d) 7, C. C. A. 2)	12
Commissioner of Internal Revenue: Dawson v. (163 F. (2d) 664, C. C. A. 6)	12
Commissioner of Internal Revenue: Dobson v. (320 U. S. 489)	10, 12
Commissioner of Internal Revenue: Freeman v. (4 T. C. 582)	6
Commissioner of Internal Revenue: Gillespie v. (128 F. (2d) 140)	11
Commissioner of Internal Revenue: Hackett v. (5 T. C. 1325, aff'd 159 F. (2d) 121, C. C. A. 1)	3, 4, 5, 6, 8, 9, 12
Commissioner of Internal Revenue: Lincoln Electric Co. v. (162 F. (2d) 379, C. C. A. 6)	12
Credit Bureau of Greater New York v. Commissioner of Internal Revenue (162 F. (2d) 7, C. C. A. 2)	12
Dawson v. Commissioner of Internal Revenue (163 F. (2d) 664, C. C. A. 6)	12
Dobson v. Commissioner of Internal Revenue (320 U. S. 489)	10, 12
Farmer's Loan & Trust Co. v. Minnesota (280 U. S. 204)	20
Freeman v. Commissioner of Internal Revenue (4 T. C. 582)	6

Gillespie v. Commissioner of Internal Revenue (128 F. (2d) 140)	11
Hackett v. Commissioner of Internal Revenue (5 T. C. 1325, aff'd 159 F. (2d) 121, C. C. A. 1).....	3, 4, 5, 6, 8, 9, 12
Hoey: Hooker v. (27 F. Supp. 489, aff'd 107 F. (2d) 1016, C. C. A. 2)	8, 9
Hooker v. Hoey (27 F. Supp. 489, aff'd 107 F. (2d) 1016, C. C. A. 2)	8, 9
Lincoln Electric Co. v. Commissioner of Internal Revenue (162 F. (2d) 379, C. C. A. 6)	12
Minneosta: Farmer's Loan & Trust Co. v. (280 U. S. 204)	20

Table of Statutes

Internal Revenue Code:

Section 22(a)	2
Section 22(b) (2)	2, 4, 6, 11, 15
Section 22(b) (2) (B)	2, 3, 7
Section 22(b) (4)	2
Section 115	2

Table of Other Authorities

Your Federal Income Tax (1947 Edition) (Bureau of Internal Revenue)	13, 14
---	--------

No. 11713

IN THE

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FREDERICK JOHN WOLFE,
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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

UPON PETITION TO REVIEW A DECISION OF THE TAX COURT
OF THE UNITED STATES

REPLY BRIEF FOR PETITIONER

The petitioner's brief was filed with the Clerk of this Court on January 12, 1948.

The respondent's brief was filed with the Clerk of this Court on or about March 18, 1948.

A motion to extend petitioner's time to reply to May 15, 1948 was granted by this Court on March 17, 1948.

Reply to Respondent's Argument

The respondent has not attempted to answer the arguments presented in petitioner's main brief. Rather, he seeks to justify the decision of the Tax Court by a reitera-

tion of the errors, misconceptions and immaterial matters relied upon by the Tax Court in its opinion.

The petitioner does *not* dispute that pensions or retiring allowances are ordinarily income to the recipients. However, the instant case cannot be decided by a mere reference to section 22 (a) of the Internal Revenue Code and the Treasury Department Regulations thereunder. Section 22 (a) of the Code is, as its title states, a "General Definition". It must be read in conjunction with the other applicable provisions of the Code. For example, if we looked only to section 22 (a), we would say that *all* interest is includible in gross income since the section states that "'Gross income' includes . . . interest. . . ." However, upon reference to section 22 (b)(4), we find that interest of certain types is to be *excluded* from gross income. Similarly, the question of the inclusion of a "dividend" cannot be determined solely by a consideration of section 22 (a); reference must also be made to section 115 to determine what dividends are to be included and what dividends are to be excluded, as for example, certain types of stock dividends and dividends from earnings or profits accumulated before March 1, 1913. Likewise, in the instant case, section 22 (a) must be considered in conjunction with section 22 (b)(2).

Section 22 (b)(2) of the Internal Revenue Code provides now, as it did in 1941, that in the case of amounts received as an annuity "there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity. . . ." Section 162 (c) of the Revenue Act of 1942 added to section 22 (b)(2) a new subparagraph (B) reading as follows:

"EMPLOYEES' ANNUITIES.—If an annuity contract is purchased by an employer for an employee under

a plan with respect to which the employer's contribution is deductible under section 23 (p) (1) (B), or if an annuity contract is purchased for an employee by an employer exempt under section 101 (6), the employee shall include in his income the amounts received under such contract for the year received except that if the employee paid any of the consideration for the annuity, the annuity shall be included in his income as provided in subparagraph (A) of this paragraph, the consideration for such annuity being considered the amount contributed by the employee. In all other cases, if the employee's rights under the contract are nonforfeitable except for failure to pay future premiums, the amount contributed by the employer for such annuity contract on or after such rights become nonforfeitable shall be included in the income of the employee in the year in which the amount is contributed, which amount together with any amounts contributed by the employee shall constitute the consideration paid for the annuity contract in determining the amount of the annuity required to be included in the income of the employee under subparagraph (A) of this paragraph."

The year here involved is, of course, 1941 and not 1942 or a later year. However, in supporting the contention advanced by the respondent, the Court in *Hackett v. Commissioner* [5 T. C. 1325, aff'd 159 F. (2d) 121, C. C. A. 1] held that the second sentence of section 22 (b) (2) (B) was merely declaratory of previously existing law. In its opinion the Court said:

"This Court was aware of the new subparagraph (B) at the time we decided the *Brodie* case. See page 285 of our opinion in that case. Nevertheless, we interpreted the existing law as meaning the same as is provided by the second sentence of new subparagraph (B), and we have been affirmed in other cases which followed the *Brodie* decision."

Similarly, in its opinion, the Circuit Court of Appeals for the First Circuit said:

“We do not feel that § 22 (b)(2)(B) should be construed as effecting or intending change in the law in this respect.”

The same result is also necessarily implied by the other decisions referred to on pages 64 and 65 of our main brief.

In the *Hackett* case, the taxpayer's employer in 1941 purchased an annuity contract for him. He contended that the consideration paid by his employer for the annuity did not constitute income to him in 1941 for various reasons including the following: (1) Since the taxpayer had had no option to receive cash instead of the contract and he had no right to assign, alienate or commute the contracts,¹ he did not “constructively receive” the consideration paid by his employer and, therefore, did not receive income, and (2) The consideration paid by his employer would not be considered as “consideration paid” for the annuity in determining the amount to be reported under section 22 (b)(2) when the annuity was paid in future years. In other words, the respondent in this case is adopting the arguments advanced by the taxpayer in the *Hackett* case which are entirely inconsistent with the arguments which the respondent there advanced and which the Circuit Court of Appeals accepted. Thus, when he says (Resp. Brief p. 24) that “Since the taxpayer did not receive the sum of \$415,000, there is no factual basis for a conclusion that the payments made to him after his retirement were made as annuities within the meaning of Section 22 (b)(2)”, he is making exactly the same argument which the Circuit Court of Appeals for the First Circuit rejected in the *Hackett* case.

¹ It may be noted that in the instant case there was no restriction against the transfer or assignment of the contract.

Respondent quite correctly says (Resp. Brief p. 19) that The taxpayer's entire case must rest upon the fact that Anglo paid Standard about \$415,000 in consideration of Standard's promise to pay the taxpayer \$3,038.75 per month, or \$36,465 per year," Similarly, the respondent's entire case in *Hackett v. Com'r* rested upon the fact that the employer paid an insurance company a sum of money in consideration of the insurance company's promise to pay the taxpayer an amount per year during his lifetime. The only difference is that in one case an insurance company is involved, whereas in the other, an insurance company is not involved. That Standard was not a commercial insurance company is entirely immaterial under the decisions cited on page 52 of petitioner's main brief.

The respondent argues (Resp. Brief p. 20):

" . . . The taxpayer construes the contract of March 22, 1940, as the purchase of an annuity by Anglo, and contends that he in effect received \$415,000 when this contract was consummated, which represents his cost of the annuity. (Br. 66.) This argument overlooks the fact that the transaction might have been either one of two things: (1) A substitution of Standard for Anglo, in which event the payments were pensions because they were made solely on account of taxpayer's 38 years of service to Standard or to a company affiliated with or controlled by Standard; or (2) the purchase of an annuity in which event the cost of about \$415,000 would have been considered taxable income to the taxpayer in the year of purchase."

We do contend that the taxpayer, in effect, received \$415,000 when the contract was consummated, not, however, in the sense that he had the option to take the cash or that he "constructively" received it, but in the sense that, as

in the *Hackett* case, the taxpayer received a valuable contract which in the language of the Circuit Court of Appeals in that case "constituted an economic benefit conferred as additional compensation which is the equivalent of cash". As was held in the *Hackett* case, we also contend that the amount paid by the employer to secure for the employee that valuable contract right represented the "consideration paid" therefor within the meaning of section 22 (b) (2).

We have not overlooked either of the two points mentioned by the respondent. Clearly, there *was* a substitution of Standard for Anglo, but the conclusion drawn from that fact by the respondent does not follow. Anglo *bought* the substitution of Standard by paying \$415,000 (R. p. 24). In *Freeman* [4 T. C. 582] the employer bought the substitution of an insurance company for his obligation to make payments to his employee.² The very connotation of purchasing an annuity is buying the obligation of another.

With respect to respondent's second point, we contend that the cost of about \$415,000 did constitute income to the taxpayer, and that fact is fundamental in our argument. The reference by the respondent to "taxable" income will be considered *infra*.

The basic principle underlying the *Hackett* case and every other case involving this point is that when an employer purchases for an employee the promise of another to make payments to the employee in the future, he is, at that time, conferring an economic benefit on the employee which constitutes income to the employee. Clearly, the

² In the *Freeman* case, the annual amount payable under the insurance company annuity contract was *less* than the annual amount the employer had been obligated to pay. Nevertheless, the cost of the annuity contract was determined to be income to the employee.

second sentence of section 22 (b)(2)(B), which as has been previously pointed out was merely declaratory of existing law, is based upon the same consideration.

At the specific instance and request of the petitioner, Anglo paid the sum of \$415,000 in cash to purchase for him Standard's promise to pay him the stated sum during his lifetime, and after his death, to his wife for one year if he survived him, under a contract which contained no restrictions on transfer or assignment (R. pp. 19, 23-26). Obviously, by that payment, Anglo conferred upon the petitioner an economic benefit which, as we have heretofore pointed out, clearly represented income to him.

Petitioner was throughout the year 1940 a non-resident alien (R. p. 16) and as such, not subject to tax in the United States. It is significant perhaps that respondent in his brief has not sought to support that portion of the opinion below (R. pp. 38, 39) to the effect that the amount paid by Anglo may not be considered in the application of section 22 (b)(2) because the petitioner did not pay a tax on that amount other than the casual reference to "taxable income" on page 20 of his brief. We have in petitioner's main brief (pp. 66, 67) discussed that question and will not repeat the discussion here. The position of the Tax Court on this point has no more basis to support it than would a contention that if the petitioner had received \$415,000 in cash and purchased an annuity, he paid no consideration for the annuity because he did not, as he was not required to do, pay a United States tax on the receipt of the \$415,000. The second sentence of section 22 (b)(2)(B), which as has been pointed out *supra*, is merely declaratory of previously existing law, states that the consideration paid by the employer shall be income to the employee and shall constitute a part of the consideration paid for the annuity; no reference is

made to whether or not a tax was, in fact, paid upon the income.³

In his brief (Resp. Brief p. 17, *et seq.*), the respondent relies heavily upon *Hooker v. Hoey* [27 F. Supp. 489, aff'd *per curiam*, 107 F. (2d) 1016 (C. C. A.-2)] as did the Court below in its opinion (R. p. 31). In that case, the taxpayer was receiving a pension from the Vacuum Oil Company. In 1931, the Vacuum Oil Company sold all of its property to Standard Oil Company of New York, the latter company assuming all obligations and liabilities of the Vacuum Company, including the obligation of the Vacuum Company to pay a pension to the petitioner. The taxpayer contended that the amounts thereafter received from Standard Oil Company of New York were annuity payments. In rejecting that argument, the District Court assigned three reasons as follows:

³ This case does not involve a situation where the taxpayer is taking inconsistent positions such as where he argues that an amount received in one year should not be included in income because it properly constituted income of a prior year, although he erroneously failed to include it in a prior year. Neither is it a case where the taxpayer seeks to gain an advantage from the fact that he was a non-resident alien in 1940. If the taxpayer had been a citizen of the United States residing in England in 1940, the consideration of \$415,000 although constituting income to him under the *Hackett* and related cases, would not have been taxable in the United States by reason of Section 116 of the Internal Revenue Code. In fact, if the taxpayer were a citizen of the United States, then the decision below would have given him a decided advantage. If the amounts paid by Standard are not annuity payments but in the nature of pension payments for services previously rendered outside the United States, then, if the taxpayer were a United States citizen, he would, for 1942 and subsequent years, be permitted to exclude from income the *entire* amounts received from Standard under section 116 (a)(2) as amended by section 148 (a) of the Revenue Act of 1942. Consequently, the position contended for by the petitioner does not operate to give him a tax advantage as contrasted with a United States citizen in similar circumstances, but merely operates to prevent the discrimination which would, under the decision below, operate against him as a resident alien in 1942 and subsequent years.

(1) There was no purchase of an annuity.

(2) There was no annuity contract.

(3) “ . . . there is utterly no basis in the facts for the claim that the sum of \$79,186.46 or any other particular sum was paid by Vacuum Oil Company to Socony Vacuum Corporation as ‘aggregate premiums or consideration’ for the latter’s assumption of the obligation to pay the plaintiff \$11,250 a year for life.”

In the instant case, Anglo did, for the sum of \$415,000, purchase a contract under which the taxpayer was to receive annual payments during his lifetime; there can be no dispute that the \$415,000 was paid for that purpose and none other (R. p. 24). As the respondent states in his brief (p. 9), it is a fact “that Anglo paid Standard about \$415,000 in consideration of Standard’s promise to pay the taxpayer \$3,038.75 per month” for his life and one additional year if his wife survived him. Consequently, none of the reasons assigned by the Court for its decision in the *Hooker* case is applicable here. The distinction between the *Hooker* case on the one hand and *Hackett v. Com’r* and the instant case on the other is obvious; in the *Hooker* case, the sale by the employer of its assets subject to its liabilities did not result in the employee receiving “an economic benefit conferred as additional compensation which is the equivalent of cash”.⁴ In the *Hooker* case, no contract was issued to the employee nor was there any basis for a contention that the transaction conferred any economic benefit on the employee as additional compensation. The purpose of the transaction was not to assure the payments to the employee, nor did Vacuum pay any particular amount to Socony in consideration of an agreement by the latter to make payments to the employee. It would indeed be a novel theory to hold that an employee received income in a transaction in which he

⁴ *Hackett v. Com’r* [159 F. (2d) 121, 123].

received nothing and in which there was no purpose or intent to give him anything, merely because the employer transferred its entire business and assets to another subject to its liabilities.

The respondent contends that the decision below must be affirmed under the so-called *Dobson* rule (*Dobson v. Com'r*, 320 U. S. 489, rehearing denied 321 U. S. 231) if the conclusion of the Court below is supported by substantial evidence (Resp. Brief p. 20, *et seq.*). We submit that (1) the issue in this case is purely one of law and, therefore, subject to review, and (2) in any event, there is no evidence, substantial or otherwise, to support the Court's conclusion.

Concededly, the opinion below is to a considerable extent a factual discussion. However, that does not obscure the fact that in the final analysis the issue is one of law, to wit: Did the making of the contract in 1940 result in the receipt by the petitioner of income in that year so that the amounts received under the contract in later years may not be considered as income in full? The Tax Court apparently recognized that when it said in the final paragraph of its opinion (R. p. 39):

“ . . . In our opinion, this is not the class of contract taxable at value to the recipient. The contracts in *Renton K. Brodie*, *supra*; *William E. Freeman*, 4 T. C. 582; *Hubbell v. Commissioner*, 150 Fed. (2d) 516; *Oberwinder v. Commissioner*, 147 Fed. (2d) 255; *Robert P. Hackett*, 5 T. C. 1325, and *Ward v. Commissioner* ----- Fed. (2d) ----- (Feb. 10, 1947), cited by petitioner, and all cases found by us following them, were all ordinary commercial annuity contracts, purchased by employers from insurance companies for employees; therefore, the fact that they were held taxable to the recipients is no indication that an agreement here by Anglo and Standard to carry out their pension policy should be considered to have

such value as to be taxable to the petitioner as recipient, and therefore offer reason to allow exemption from tax amounts received in later years under the contract."

If the purport of the Court's statement is that the decisions cited apply only to a certain "class of contract" and not to other classes, and that they apply only to "ordinary commercial annuity contracts", that is, we submit, clearly a decision on a question of law. It would be equivalent to holding that in section 22 (b)(2), the term "annuity" means only an ordinary commercial annuity contract, a holding which this Court has specifically rejected. (*Gillespie Com'r*, 128 F. (2d) 140.)

If the purport of the Court's statement is that the contract in question did not have "such value as to be taxable", the Court has, in fact, made no finding of value. It merely states that the fact that contracts issued by insurance companies were held taxable to the recipients is no indication that a contract issued by Standard had "such" value. If, however, the statement was intended to be a "finding", it has absolutely no support in the record. Anglo paid \$15,000 in order to secure the contract for the petitioner (R. p. 24), and there is absolutely nothing in the record to create even an inference that the contract did not have a value equal to the consideration paid to obtain it. In fact, as the Court below pointed out, the cost of the contract purchased from an insurance company, instead of from Standard, would have been about \$499,000 (R. p. 37). Certainly, there is no basis for any conclusion that a promise to pay by Standard Oil Company of New Jersey, one of the country's great corporations, is to be considered as of less value than that of the strongest insurance company. The Court below in its opinion stated that the contract was "in ordinary negotiable or assignable form" (R. p. 39).

Exactly what that statement was intended to imply is not clear. Admittedly, the contract was not in the form of an ordinary negotiable promissory note, nor did it contain any specific provision authorizing assignment. On the other hand, it did not contain any provision forbidding or limiting an assignment (R. pp. 23-26), and we are aware of no reason why the contract could not be assigned by the petitioner. However, it is submitted that there is no necessity for a consideration of that question. The taxpayers in *Hackett v. Com'r* had no right to assign, alienate or commute the contracts there involved, or any payments thereunder, and the contracts had no loan or cash surrender value. That fact, however, did not prevent the Court from holding that the consideration paid for such contract by the employer constituted income to the taxpayer.

A substantial part of the opinion of the Court below is directed to a discussion of whether the petitioner received an "annuity" or a "pension" or "benefits from a retirement fund", and it is the Court's conclusion on this point which the respondent suggests is binding, if supported by substantial evidence, upon this Court under the *Dobson* rule (Resp. Brief p. 20).⁵

The fundamental error which the Court below has made on this point is in failing to recognize that a pension is, in fact, a form of annuity. In the ordinary case of a pen-

⁵ One of the petitioner's Statement of Points is that the Tax Court is an administrative agency and its decisions subject to review within the scope of the Administrative Procedure Act (R. p. 57). This issue does not seem to have been definitely decided. (*Lincoln Electric Co. v. Com'r*, 162 F. (2d) 379 (C. C. A.-6); *Dawson v. Com'r*, 163 F. (2d) 664 (C. C. A.-6); *Credit Bureau of Greater New York v. Com'r*, 162 F. (2d) 7 (C. C. A.-2); *Anderson v. Com'r*, 164 F. (2d) 870 (C. C. A.-7).) For the reasons hereinafter mentioned, we submit that the decision of the Tax Court involves purely a question of law and is subject to review in any event. Consequently, this brief will not be unduly extended by a discussion of the effect of the Administrative Procedure Act.

n, the recipient may not exclude from gross income any part of the amount received, not because the pension is not a form of annuity, but because no consideration was paid therefor. However, where a consideration is paid, for example where the employee makes some contributions to the pension fund, the pension payments received are taxed in exactly the same manner as any other annuity for which a consideration was paid. This is made clear by the following excerpt from a bulletin⁶ issued by the Bureau of Internal Revenue:

“The terms ‘annuity’, ‘pension’, and ‘retirement pay’ are often confused with each other. Sometimes these terms are used to describe a plan in which an individual invests some of his own money—either with an insurance company or with his employer—in order to assure himself that he will receive a steady income when he reaches a certain age. At other times, the same terms are used to describe payments which are made by an employer entirely out of his own funds to reward a faithful employee.

“For income tax purposes, all of these plans are, in effect, treated alike so that the recipient of an annuity, pension, or retirement pay is allowed to recover his own investment, if any, tax-free but is required to pay tax on the remainder of the benefits that he receives, as explained in the first part of this article. Therefore, in those cases where the employer pays the entire cost of a pension, the retired employee has no cost to recover and his entire pension is taxable as if it were a payment of additional wages and salary.”

Although the last sentence quoted refers to cases where the entire cost is paid by the employer, the Bulletin also makes plain that the sentence does not apply where before the employee's retirement the employer makes payments

⁶ Your Federal Income Tax (1947 Edition), page 63.

which constitute income to the employee at that time. Thus, it is said:⁷

“Pensions or retirement pay received from employees’ trusts should be treated in the same way as annuities. If the trust is one which meets the statutory tests for exemption from income tax, the amounts, if any, contributed by you as an employee constitute your basic cost of the annuity; if you made no payments to the trust, your cost is zero. If, however, the trust is not exempt from tax, contributions to the trust by the employer are treated as additional compensation to you as the employee, and are taxable to you when credited to the trust, if your rights to a future annuity would not be forfeited by your resignation or discharge occurring before the retirement date. Amounts thus taxed to you as the employee may be treated as part of your basic cost of the annuity.”

The Tax Court, by falling into an error of law, has missed the point of the case; it has reasoned that (1) a pension constitutes income and therefore (2) the case must be decided by determining whether the amounts paid to the petitioner constituted “pension” payments. The label which is to be attached to the payments therefore, becomes, in the view of the Tax Court, of paramount importance and decisive of the result. The real and determinative question is ignored by the Court until the last paragraph of its opinion and then that question is, in effect, brushed aside without any legal or factual basis (see discussion, *supra*, p. 10).

This case can be decided only after the fundamental issue has been answered: Did the payment of \$415,000 by Anglo and the issuance of the contract by Standard in 1940 result in income to the petitioner at that time? If that question is answered in the negative (which we submit would

⁷ *Ibid.* page 63.

erroneous), then it follows that the annual payments received by the petitioner constitute amounts taxable to him in full at the time of receipt. If, on the other hand, the question is answered affirmatively, then the principle intended for by the petitioner automatically follows. If the amount paid by the employer is the employee's income, then the "consideration paid" is from the employee's income which he is entitled to recover in the manner provided in section 22 (b)(2). Calling the amounts thereafter paid under the contract a pension, retirement pay or an annuity is unimportant; as the Bureau of Internal Revenue has stated, they are for tax purposes "treated alike".⁸

Although for the reasons stated we believe it is not of importance in the consideration of this case, we believe we should mention briefly some of the misstatements and half-truths running through the Tax Court's opinion. The Court found as a fact that:

"Various procedures for paying the petitioner were discussed by Standard, Anglo, and petitioner. Among them was a proposal to purchase an annuity for petitioner from a commercial insurance company. This proposal was never accepted or put into effect" (R. p. 19).

Nevertheless, the Court persists in quoting from correspondence during the entire period, with an utter disregard of which of the various procedures was being discussed. Thus, the Court twice quotes (R. pp. 33, 36) from a letter dated January 9, 1940 from Standard to Anglo in which reference was made to the money Anglo had provided "plus the additional amounts which Standard . . . will be required to put up". This then is assumed to establish that Standard was contributing to a retirement fund and would be required to put up additional money. Carefully, any reference is

⁸ See page 13, *supra*.

avoided to the letter three days later stating: "When I wrote you the other day, I failed to realize that you have a three-corner agreement. . . . This phase of the case has not been adequately considered" (R. p. 85). The later letter shows that the statements made in the letter of January 9 were made under a misunderstanding of the facts and were not accurate. Does the agreement of March 22, 1940 (R. pp. 23-26) require Standard "to put up" any additional amounts? The answer is "No". Standard, under that contract, received approximately \$415,000 and became obligated to pay approximately \$36,000 per annum. Standard assumed the risk, inherent in writing any annuity, that if the petitioner lived long enough, the payments to him would exceed the amount received. As compensation, it received the chance of a substantial profit if the petitioner did not survive. The petitioner would have to live more than 11 years before the \$36,000 payments equalled the \$415,000 received, and if any reasonable rate of income on the \$415,000 is assumed, the period would be considerably lengthened. The petitioner has not yet lived even the 11-year period, and there is no more basis for assuming that Standard will ever have to "put up" anything than there would be in assuming that an insurance company having issued the same contract would have to "put up" anything.

Similarly, reference is made by the Court (R. p. 37) to a statement in a letter dated June 29, 1939 that "it is further proposed that Anglo transfer to S. O. of N. J. for deposit to the sub-account for assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability". The Court then concludes, "This has the sound of mere contribution by Anglo to a general fund, rather than purchase of annuity." All of which is true, except that it has nothing to do with the contract of March 22, 1940. On June 29, 1939, Mr. F. W. Pierce "proposed" a deposit to a sub-account at a time long before the annuity arrange-

ent was agreed upon and clearly was one of the various plans considered but not consummated. Mr. F. W. Pierce, who wrote the letter of June 29, 1939, was, incidentally, the same gentleman who on January 12, 1940 wrote that on January 9, 1940 he "failed to realize" what the arrangement then was (R. p. 85). At the time the letter of June 29, 1939 was written, the purchase of an annuity from an insurance company was another of the plans still being considered as is shown by the references in the letter to "insuring" the pension and "premium refund" (R. p. 83). Nevertheless, that letter is considered by the Court as evidence of what was the plan finally adopted.

The Court below (R. p. 37) and the respondent (Resp. Brief p. 24) lay stress on the fact that a purchase of a similar annuity from an insurance company would have cost about \$499,000, whereas Anglo paid Standard only \$15,000. These calculations were apparently based upon rates for particular annuity contracts issued by Equitable (R. pp. 91, 92). These rates include the insurance company's "loading" charge, which on a policy costing \$491,000 would amount to \$40,000 (R. p. 85). Further, these particular policies had features not included under the contract of March 22, 1940. One of the policies was a participating policy paying dividends estimated to be from approximately 7½% to at least 8.8% per annum (R. p. 93). Under the other, "any surplus resulting by death shortly after retirement would be reflected in dividends" (R. p. 90). Further, the rates would be less if a non-par company were used (R. p. 91). That Standard, which did not have to consider "loading", which issued a contract not providing for dividends or any form of refund in the event of premature death and which may have been able to contemplate a higher rate of return, was willing to issue the contract for less than a particular insurance company would charge for a contract providing some additional benefits, establishes

nothing, other than the probable reason why Anglo bought the annuity from Standard rather than the insurance company.

In its opinion, the Court asks, "If, as in effect the petitioner argues, Anglo simply purchased an annuity contract from Standard as a mere vendor thereof, why should it be based in part on service rendered for earlier employers?" (R. p. 33.) The answer is not as the Court infers later in its opinion that "it is obvious from the fact of coverage of years prior to service with Anglo that it was doing so because of its relation to Standard, and not because the approximately 10 years of service performed by petitioner for Anglo required the 'contribution' of the full amount of 89,120 pounds sterling" (R. p. 38). Anglo paid 89,120 pounds sterling for the simple reason that that amount represented the capital sum of the liability which it then had to the petitioner and which it incurred under the resolution of its Board of Directors adopted October 22, 1931 (R. pp. 19, 23, 24). Anglo and no one else had that liability. Anglo incurred the liability because the petitioner when he went with the company "told them very 'plainly' " that he wanted it (R. pp. 17, 18).

The petitioner's request to Anglo in 1931 that he wanted his prior service to be considered and Anglo's agreement thereto is not an unusual circumstance. Any individual who had, through 28 years of service for one employer, built up substantial retirement benefits would indeed be extremely foolish to leave that employment unless the new employer agreed to compensate him fully for the valuable rights which he was surrendering by changing employment, whether the new employer were affiliated with the old or entirely unrelated. That is all that the petitioner did when he told Anglo "that he wanted to be considered on the same basis as those who were under the superannuation plan"

. pp. 17, 18). The Court below seems to think that since both Imperial and Anglo were affiliates, Standard should have assumed the retirement benefits which the petitioner had built up by his 28 years of service to Imperial and its predecessors. However, the fact is that Anglo, and not Standard, assumed those obligations by the resolution of its Board of Directors (R. p. 19). The petitioner's services were to be rendered to Anglo, and not to Standard, and it was eminently proper for Anglo to pay the consideration necessary to secure the services rendered to it. When Anglo paid the sum of approximately \$415,000, it was paying the actuarial capital value of the obligation which it then had to the petitioner, an obligation which it, and it alone had, and which it had incurred as part of the price of securing the petitioner's services to it.

The foregoing examples demonstrate clearly, we believe, that the Court's opinion is not supported by evidence, substantial or otherwise. In any event, the statements of the Court throughout its opinion, with the single exception of the last paragraph, do not affect the basic legal question presented by this case. Did the execution of the contract on March 22, 1940 result in the receipt of income by the petitioner in 1940? The respondent recognizes that that is the basic question when he says (Resp. Brief p. 24):

"If the facts of this case were altered and it appeared that Anglo had used the sum of \$415,000 to purchase an annuity policy from an insurance company, or if it had paid that sum to the taxpayer who in turn purchased the annuity, we would agree that the annual payments received by the taxpayer would have been controlled by Section 22 (b)(2) of the Internal Revenue Code, *supra*. In that event the sum of \$415,000 would have constituted income to the taxpayer at the time of its receipt. *Hackett v. Commissioner*, 159 F. 2d 121 (C. C. A. 1st); *Oberwinder v. Commissioner*, 147 F. 2d 255 (C. C. A. 8th);

Hubbell v. Commissioner, 150 F. 2d 516 (C. C. A. 6th); *Ward v. Commissioner*, 159 F. 2d 502 (C. C. A. 2d)."

The respondent further admits that it is a fact "that Anglo paid Standard about \$415,000 in consideration of Standard's promise to pay the taxpayer \$3,038.75 per month . . ." (Resp. Brief pp. 19, 20).

For the reasons heretofore pointed out (pp. 11, *et seq.*) we submit that there is no basis in law for a decision distinguishing between a payment by Anglo of \$415,000 in consideration of a Commercial Insurance Company's promise to pay the taxpayer \$3,038.75 per month and a payment by Anglo of \$415,000 in consideration of Standard's promise to pay the taxpayer \$3,038.75 per month. Taxation is stated to be "an intensely practical matter". (*Farmer's Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 212.) There certainly is no practical difference between the two situations just mentioned. If the petitioner were here arguing that the contract of March 22, 1940 did not result in income to him in 1940, could he defend the assertion that he did have income by merely pointing out that Standard is not an insurance company? We feel certain that such a defense would not be accepted.

Dated: Los Angeles, California, May 11, 1948.

Respectfully submitted,

WILLIAM GALBALLY, JR.,
510 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

Of Counsel:

JAMES O. WYNN,
GEORGE G. BLATTMACHR.

No. 11714

United States
Circuit Court of Appeals
For the Ninth Circuit.

BILLY BERNARD BLEDSOE,

Appellant.

VS.

AMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

No. 11714

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLY BERNARD BLEDSOE,

Appellant.

VS.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Certificate of Clerk to Transcript of Record on Appeal	16
Designation of Record on Appeal	15
Designation of Record to be Printed for Appeal	18
Grounds for the Writ	6
Motion to Dismiss Petition for Writ of Habeas Corpus	12
Motion—Statement of Points to be Relied Upon on Appeal and Designation of Record to be Printed	17
Names and Addresses of Attorneys	1
Notice of Appeal	14
Order Denying Petition for Writ of Habeas Corpus and Discharging Order to Show Cause	13
Order That Transcript of Record on Prior Appeal May be Referred to as Part of Transcript on This Appeal	19
Order to Show Cause	11
Petition for Writ of Habeas Corpus	2
Statement of Points to be Relied Upon on Appeal	14

NAMES AND ADDRESSES OF ATTORNEYS

BILLY BERNARD BLEDSOE,

Alcatraz, California,

In Propria Persona.

FRANK J. HENNESSY,

United States Attorney,

Northern District of California.

Post Office Building,

San Francisco, California.

Attorney for Respondent and Appellee.

On appeal from the United States District Court
for the Northern District of California, South-
ern Division.

Decision of the Honorable Michael J. Roche,
District Judge.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 27412 R

BILLY BERNARD BLEDSOE,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

Respondent.

PETITION FOR
WRIT OF HABEAS CORPUS

To the Honorable Judge of the United States
District Court for the Northern District of
California, Southern Division:

Petitioner requests this court to take judicial
notice of its own records on file in this court in
action No. 24843-S, all exhibits referred to herein-
after will be found in the above mentioned cause
in this court—No. 24843-S.

Comes now the petitioner, Billy Bernard Bledsoe,
by his verified petition, and alleges:

I.

That your said petitioner is now unlawfully re-
strained of his liberty by the respondent James A.
Johnston, Warden of the United States Peniten-
tiary, Alcatraz Island, California, which said peni-
tentiary is located in the City and County of San
Francisco, State of California; that your said

petitioner and the said James A. Johnston, and the said United States penitentiary are each and all of them situated and located within and subject to the jurisdiction of the above entitled court; that this said court does have jurisdiction of this habeas corpus proceeding.

II.

That the cause or pretense of the petitioner imprisonment and restraint by the respondent in his capacity as warden is founded upon and under color of authority, of the United States, by virtue of two judgments, commitments and sentences, each of which issued from, out of, and under the seal of the District Court of the United States, for the Eastern District of Texas, Paris Division in the State of Texas, on or about the 11th day of December, 1939, in action No. 1335 and action No. 1166 of said court above mentioned; that the said judgments, commitments and sentences above referred to were in each instance based upon pleas of guilty by the petitioner in the two separate actions, No. 1335, and No. 1166, as above referred to; that in each instance said pleas of guilty were to alleged violations of the United States Code, Title 18, Section 315.

III.

That thereafter and on the 25th day of September, 1944, your petitioner filed a petition for writ of habeas corpus in the above entitled Court which said action was number 23722-S on the records of

said court; that annexed to said petition in action No. 23722-S on the records of this court, were petitioners exhibits (3) A, B, & C, which are certified copies of the documents herein after described. That said exhibits A.D. and C in action No. 23722-S were annexed to and incorporated and made a part of action No. 24843-S on file in this court and referred to by petitioner in this present petition; A. "Exhibit A" consists of copies of the indictment judgment, commitments, sentences and return in criminal case No. 1335 made and entered on the 11th day of December, 1939, in the court above referred to.

B. "Exhibit B" consists of the Docket entries in cause No. 1166 showing that the sentences imposed in cases No. 1166 and No. 1335 are to run concurrently. C. "Exhibit C" consists of three documents (1) a certified copy of the indictment upon which action No. 1166 was based, which said indictment was returned on the 4th day of December, 1939; (2) a certified copy of judgment and sentence in action No. 1166, made and entered on the 11th day of December, 1939; (3) Certified copy of judgments and commitment and marshal's return in action No. 1166 made and entered on the 11th day of December, 1939.

The Marshal's return in both cases as contained in said exhibits, disclose that the petitioner was delivered by the United States Marshals to the Lamar County jail on the 11th day of December, 1939, and in each instance was thereafter and on

December 15, 1939, delivered to the United States Penitentiary, at Leavenworth, Kansas, together with certified copies of the judgment and commitment in each of the above numbered cases, No. 1335 and No. 1166.

IV.

That upon the hearing of the said petition No. 23722-S by the above entitled court the Honorable A. F. St. Sure, the United States District Court, Judge presiding, the said judge did then and there issue in said action No. 23722-S a certain memorandum and order, a copy of which is entitled exhibit "D" in the records of this court in action No. 24843-S.

That in conformance with the said aforementioned order, exhibit D, this petitioner was returned to Paris, Texas, where he appeared before the Honorable Robert L. Williams, United States Circuit Court judge sitting by assignment in the United States District Court for the Eastern District of Texas, Paris Division, on the 29th day of January, 1945, at which time a motion was filed by Steve M. King, United States Attorney for the Eastern District of Texas in the action of United States of America v. Billy Bernard Bledsoe, et al. Criminal No. 1166, Texarkana, Division and Criminal No. 1335, Jefferson Division. That a certified copy of the said motion is marked Exhibit "E" in action No. 24843-S of this court.

That in line with said motion, on the said 29th

day of January, 1945, in the said District Court of the United States, Eastern District of Texas, Paris Division, proceeding was had, a transcript of which proceeding, is marked exhibit "F" in said prior petition in this court, No. 24843-S.

That after the hearing as evidence by the above mentioned exhibit F, and on or about the 6th day of February, 1945, the court entered a certain order in the action of United States of America v. Billy Bernard Bledsoe, Criminal No. 1166, Texarkana Division, which said order is evidenced by exhibit G and made a further order in the action of United States of America v. Billy Bernard Bledsoe, et al., Criminal No. 1335, Jefferson Division, as evidenced by exhibit "H," both of which said exhibits "G" and "H" are to be found in the records of this court in action No. 24843-S.

That the said exhibits above referred to and each of them were made during the regular course of business by the District Court of the United States, Eastern District of Texas, Paris Division, and by the District Court in the Southern Division, of the United States for the Northern District of California.

Grounds for the Writ

That the petitioner herein has been since the 15th day of September, 1944, and now and presently is being illegally and unlawfully restrained and deprived of his liberty in violation of the Statutory Laws, the Constitution provision of the Constitu-

on of the United States, and the amendments hereto, for the following reasons:

1. That the said petitioner has fully and completely served and discharged the sentences and judgments imposed upon him by the District Court of the United States, Eastern District, Paris Division, in actions No. 1335 and No. 1166, which said judgments are exhibits "A" and "C" of action No. 24843-S of this Court.

2. That at the time of the filing of the petition for writ of habeas corpus on the 25th day of September, 1944, in action No. 23722-S before the above entitled court, the said petitioner had fully and completely served and discharged the sentences and judgments then in force and effect, which said sentences and judgments were neither void nor incapable of construction within the limits of said judgments as evidence by exhibits "A" and "C" of this court records in action No. 24843-S.

3. That the judgments issued December 11th, 1939, exhibits "A" and "C" are valid judgements for a term of five (5) years.

4. That the judgments issued February 6th, 1945, marked exhibits "G" and "H" are null and void and of no force and effect in that judgments "G" and "H" in effect increased petitioners punishment by a term of five (5) years, and after the original judgments had been fully served; and that the Court had no jurisdiction to increase its own written and signed judgements.

5. That the petitioner herein is now being illegally and unlawfully imprisoned and restrained of his liberty in the United States Penitentiary at Alcatraz by the respondent herein under color of authority of said judgments "G" and "H" and by a misapplication, misunderstanding and wrongful interpretation by the respondent of the sentences, judgments and commitments made and entered by the District Court of the United States, Eastern District, Paris Division, in actions No. 1335 and No. 1166, on the 11th day of December, 1939; that by reason of said misapplication, misunderstanding and wrongful interpretation by the respondent of said sentences, and judgments in the actions aforementioned the said respondent threatens to keep the petitioner imprisoned for another term of five years, and will do so unless this court issues the Writ of Habeas Corpus requested herein. That respondent has erroneously and unlawfully concluded that the sentences, judgments and commitments in the two actions above referred to ("A" and "C") were to run consecutively and not concurrently, where as in truth and fact the said sentences, under the existing law, have run concurrently, and both of said sentences have been served in full, and this petitioner should have been discharged on the 15th day of September, 1944.

Wherefore the petitioner herein respectfully prays:

That this Honorable Court issue an order to show cause herein, ordering and commanding the

respondent to appear before this court and show cause, if any he may have, why a writ of Habeas Corpus should not be issued herein, and that thereafter upon the hearing of the order to show cause, the said court should proceed to determine the fact and cause of petitioners restraint of liberty by hearing such testimony of the petitioner as appertains to said matter, and arguments, and thereupon enter an order sustained said petition granting the Writ of Habeas Corpus, and discharge the petitioner from further custody of respondent, and from further illegal restraint of his liberty, as law and justice require.

And petitioner will ever pray.

Respectfully submitted,

BILLY BERNARD BLEDSOE,
Petitioner pro se.

State of California,
City and County of San Francisco—ss.

Billy Bernard Bledsoe, being first duly sworn,
deposes and says:

That he is the petitioner in the above entitled matter; that he knows the contents of the foregoing petition for Writ of Habeas Corpus; that the same is true of his own knowledge except as to matters stated therein on information and beliefs, and as to those matters he believes it to be true.

BILLY BERNARD BLEDSOE,
Petitioner pro se.

Subscribed and sworn to before me this 10th day
of July, 1947.

[Seal]

E. J. MILLER,

Associate Warden, United
States Penitentiary,
Alcatraz, California.

Records at U. S. Penitentiary, Alcatraz, California, indicate that Billy Bernard Bledsoe is a citizen of the United States.

[Endorsed]: Filed July 12, 1947.

District Court of the United States
Northern District of California

No. 27412 R

BILLY BERNARD BLEDSOE,

Petitioner,

vs.

JAMES A. JOHNSTON, Warden,

Respondent.

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading
the verified petition on file herein;

It Is Hereby Ordered that James A. Johnston,
Warden of the United States Penitentiary, at
Alcatraz Island, State of California, appear before
this Court on the 21st day of July, 1947, at the
hour of 10 o'clock a.m. of said day, to show
cause, if any he has, why a writ of habeas corpus
should not be issued herein, as prayed for, and that
a copy of this order be served upon the said
Warden of the United States Penitentiary, at
Alcatraz Island, State of California, by mail and
that a copy of the petition and this order be served
upon the United States Attorney for this District,
his representative herein.

Dated: July 14th, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed July 14, 1947.

[Title of District Court and Cause.]

MOTION TO DISMISS
PETITION FOR WRIT OF HABEAS CORPUS

Comes now James A. Johnston, Warden, United States Penitentiary, respondent above named, and moves this Honorable Court to dismiss the petition for writ of habeas corpus in the above-entitled case on the grounds that it appears from the undisputed records in the cause that the facts alleged in the petition and all supporting documents are insufficient as a matter of law to support or justify the issuance of a writ of habeas corpus or any order or process discharging the petitioner.

Dated: July 21, 1947.

FRANK J. HENNESSY,
United States Attorney.

JOSEPH KARESH,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed July 21, 1947.

Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT OF
HABEAS CORPUS AND DISCHARGING
ORDER TO SHOW CAUSE

The petitioner herein again by habeas corpus seeks his release from the custody of the respondent, the Warden of the United States Penitentiary, Alcatraz, California, a prior application having heretofore been denied by this Court in Case No. 4843-S, which denial was affirmed on appeal.

Bledsoe vs. Johnston, 154 (2d) 458, certiorari denied, 328 U. S. 872.

The grounds alleged in the instant petition are the same as those heretofore alleged in petitioner's prior application, and although res adjudicata does not apply in habeas corpus proceedings, a prior refusal to discharge on a like application may be considered and given controlling weight.

Swihart vs. Johnston (CCA-9), 150 F. (2d) 721; Certiorari denied, 327, U. S. 789.

Ordered: The petition for writ of habeas corpus is hereby denied and the order to show cause heretofore issued is hereby discharged.

Dated: July 26th, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed July 26, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL
TO CIRCUIT COURT OF APPEALS

Notice is hereby given that Billy Bernard Bledsoe, petitioner above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain order denying and dismissing petitioner's petition for Writ of Habeas Corpus, which said order was signed by Judge Michael J. Roche and entered in this action on July 26th, 1947.

Dated: July 31st, 1947.

BILLY BERNARD BLEDSOE,
Pro se.

[Endorsed]: Filed Aug. 1, 1947.

[Title of District Court and Cause.]

STATEMENT OF POINT
TO BE RELIED UPON APPEAL

The points upon which appellant intends to rely on this appeal is as follows:

That the appellant's sentence was increased by a term of five (5) years over five years after imposition of sentence and, that the Court erred in denying petitioner's petition for Writ of Habeas Corpus.

BILLY BERNARD BLEDSOE.

[Endorsed]: Filed Aug. 1, 1947.

Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Petitioner appellant herein hereby presents his designation of the portions of the records, to be contained in the record on appeal:

1. The petition for Writ of Habeas Corpus
2. Motion to Dismiss Petition
3. Order Denying petition for Writ of Habeas Corpus and discharging order to show cause.
4. Order to show cause
5. Notice of Appeal
6. Statement of points to be relied upon appeal
7. This Designation of record on Appeal and Notice of Petitioners appellant request the Honorable Court of the Ninth Circuit Court of Appeals to take judicial notice of its own records in Bledsoe v. Johnston, Case No. 11,163, for exhibits referred to in this appeal, said records are printed and on file in this court and are marked in alphabetical form.

Dated: July 31, 1947.

BILLY BERNARD BLEDSOE,
Pro. se.

[Endorsed]: Filed Aug. 1, 1947.

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 15 pages, numbered from 1 to 15, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of Billy Bernard Bledsoe, Petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California, Respondent, No. 27412-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$4.70, and that the said amount has been paid to me by the Petitioner herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 18th day of August, A.D. 1947.

C. W. CALBREATH,
Clerk,

By M. E. VAN BUREN,
Deputy Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11714

BILLY BERNARD BLEDSOE,

Appellant,

vs.

JAMES A. JOHNSTON,

Appellee.

MOTION

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEALS AND DESIGNATION
OF RECORD TO BE PRINTED

Comes now the appellant, Billy Bernard Bledsoe,
his own proper person, and having heretofore
filed his Statement of Points upon which he will rely
for a reversal of the order of the court below denying
his petition for Writ of Habeas Corpus, which
Statement of Points are adopted herein upon this
appeal, now moves that this Honorable Court con-
sider appellant's designation of records contained
in his practice for the transcript that was heretofore
filed in the court below to be printed herein upon
appeal, in that:

I.

That the appellant's sentence was increased by
a term of five (5) years over five years after im-
position of sentence contrary to law and that court
erred in denying appellant's petition for Writ of
Habeas Corpus.

DESIGNATION OF RECORD
TO BE PRINTED FOR APPEAL

1. The petition for Writ of Habeas Corpus.
2. Motion to dismiss petition.
3. Order Denying petition for Writ of Habeas Corpus.
4. Order to Show Cause.
5. Notice of Appeal.
6. Statement of Points to be relied on upon appeal.
7. Designation of records to be printed upon appeal.
8. This motion.
9. Request for the Ninth Circuit Court of Appeals to take judicial notice of parts of its own printed records in Bledsoe vs. Johnston Case No. 11,163.

Dated: August 22, 1947.

/s/ BILLY BERNARD BLEDSOE,
Pro Per.

[Endorsed]: Filed Aug. 26, 1947.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11714

ELLY BERNARD BLEDSOE,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

ORDER THAT TRANSCRIPT OF RECORD
ON PRIOR APPEAL MAY BE REFERRED
TO AS PART OF TRANSCRIPT ON THIS
APPEAL

Upon consideration of the application of Mr.
Elly Bernard Bledsoe, in propria persona for
appellant, and good cause therefor appearing, It
Ordered that the parties in this cause may refer
and use as a part of the transcript of record in
this cause the transcript in the previous appeal of
appellant, No. 11163, provided that such parts of
the previous record in No. 11163 as will be referred
were before the District Court as a part of the
record in the instant case.

/s/ FRANCIS A. GARRECHT,
Senior United States
Circuit Judge.

Dated: San Francisco, Calif., September 3, 1947.

[Endorsed]: Filed Sept. 3, 1947.

No. 11,714

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BILLY BERNARD BLEDSOE,

Appellant,

v.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz Island, California,

Appellee.

BRIEF FOR APPELLANT

FILED

OCT 10 1947

BILLY BERNARD BLEDSOE,

Appellant pro. se.

PAUL P. DUHON,

CLERK

SUBJECT INDEX

	Page
Statement of Jurisdiction	1- 2
Request for Judicial Notice of Courts' Records	2- 3
Statement of the Case	3- 6
Argument	6-13
Conclusion	13-14

	Page
Aderhold v. McCarthy, 65 F. (2d) 452	7
Biddle, Warden, etc. v. Hall, 15 Fed. (2d) 840	7
Bledsoe v. Johnston, 154 F. (2d) 458 2, 4, 7, 8, 9, 11	11
Downey v. United States, 91 Fed. (2d) 223	7
Ex Parte Catanzaro, 138 F. (2d) 100-101	2
Ex Parte Gafford, 83 Am. St. Rep. 568, 12 L. R. A. (U. S.) 124	7
Ex Parte Mitsuye-Endo, 65 S. Ct. 208	2
Feswick v. United States, 67 S. Ct. 244	2
In re Breton, 79 Am. St. Rep. 335	7
In re Fegler, 36 Fed. Supp. 88	7
Miller v. Sanford, 161 F. (2d) 291	9
Kerr v. Squire, 151 F. (2d) 308, 310	10
Puccinelli v. United States (9th Cir.), 5 F. (2d) 6	7, 9, 11
Rutledge v. United States, 146 F. (2d) 199	11
Swihart v. Johnston (C. C. A. 9), 150 F. (2d) 721	9, 10
U. S. ex rel Chasteen v. Denmark, 138 F. (2d) 289	7
U. S. ex rel Nickolson v. Dillard, C. C. A. Va., 1939, 102 F. (2d) 94	2
United States v. Patterson, 29 F. 775	7, 9, 10
Waley v. Johnston, 316 U. S. 101	10
<i>Code:</i>	
U. S. Code, Title 18, Sec. 315	3
U. S. C. A., Sec. 225	2
U. S. C. A., Title 18, 716b	2, 6, 12
U. S. C. A. Sec. 709	8
<i>Text:</i>	
44 A. L. R. 1203 and cases cited	12
44 A. L. R. 1204 and cases cited	12
<i>Rule:</i>	
Rule I of the Rules of Criminal Procedure After Plea of Guilty, Verdict or Finding of Guilt	9

No. 11,714

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BILLY BERNARD BLEDSOE,

Appellant,

v.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz Island, California,

Appellee.

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from an order denying appellant's Petition for Writ of Habeas Corpus No. 27412-R, filed in the Southern Division of the United States District Court for the Northern District of California.

The court below assumed jurisdiction because that court does have jurisdiction of habeas corpus proceedings, and the appellant, the appellee, James A. Johnston, Warden, as well as the United States Penitentiary, Alcatraz Island, California, were each and all situated and located within and subject to the jurisdiction of the said court.

Jurisdiction of the court is invoked under 28 U. S. Sec. 225,—the notice of appeal having been filed on July 31, 1947, within three months from entry of the order denying appellant's petition for writ of habeas corpus. Through the power conferred upon the respondent herein by Section 716b of Title 18 U. S. C. A., the appellant has been released from the close confinement of the penitentiary, but he is still within and subject to the custody of the respondent herein. That is to say:

“While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term. * * * While this is an amelioration of punishment, it is in legal effect imprisonment.” (*Anderson, Warden v. Carroll*, 263 U. S. 193.)

The important fact to be observed in the record to the mode of procedure upon this writ is, that it is directed to, and served upon, not the appellant, but the respondent.

See also, *Ex Parte Mitsuye-Endo*, S. Ct. 208, U. S. ex rel *Nikolson v. Dillard*, C. C. A., Va., 1939, 102 F. (2d) 94; *Ex Parte Catanzaro*, 138 F. (2d) 100-101 [3, 4]; *Fiswick v. United States*, 67 S. Ct. 224.

REQUEST FOR JUDICIAL NOTICE OF THIS COURT'S RECORDS

The appellant herein, requests this court to take judicial notice of its own printed records in *Bledsoe v. Johnston*, No. 11,163. This appellant will refer to parts of the said record and note it as (Tr. R. No. 11,163, p.). The present transcript of record will be referred to and noted as

(Tr. R. No., p.). Both of the above mentioned records are of the same person and the same original case.

STATEMENT OF THE CASE

The appellant was an inmate of the United States Penitentiary of Alcatraz Island, California. He is serving terms under two judgments, commitments and sentences, all of which were issued out of and under the seal of the District Court of the United States for the Eastern District, Paris Division, State of Texas, on the 11th day of December, 1939, in Actions No. 1335 and No. 1166, in the said United States District Court. (Tr. R. No. 11,163, pp. 13, 19.) The appellant pled guilty in each of these actions, to alleged violation of the United States Code, Title 18, Section 315.

The appellant filed a petition for a writ of habeas corpus in the United States District Court, for the Northern District of California, on the 25th day of September, 1944, and the disposition of that petition was by memorandum and an order by Judge A. F. St. Sure (Tr. R. 11,163, p. 24) that said memorandum and order in that action ordered the appellant returned to the United States District Court for the Eastern District of Texas, at Paris, Texas, for further proceedings.

In line with the above mentioned order by Judge A. F. St. Sure, the appellant was returned to the Texas court, and on the 29th day of January, 1945, a proceeding was held (Tr. R. 11,163, p. 33), and appellant was returned to

Alcatraz and on the 6th day of February, 1945, the Texas court entered two new or alleged corrected judgments (Tr. R. No. 11,163, pp. 45, 49), as a result of the above mentioned proceedings.

The appellant, in April, 1945, filed a second petition for writ of habeas corpus (Tr. R. No. 11,163, p. 2), seeking his release from prison. The respondent filed a motion to dismiss. (Tr. R. 11,163, p. 54.) On July 20, 1945, the Honorable Judge St. Sure entered a memorandum and order granting motion to dismiss. (Tr. R. No. 11,163, p. 54.) The appellant appealed to this Honorable Court and on March 20, 1946, an opinion was filed affirming this said memorandum and order granting motion to dismiss (Tr. R. No. 11,163), *Bledsoe v. Johnston*, 154 F. (2d) 458. The appellant petitioned the United States Supreme Court for a writ of certiorari, said petition was denied June 10, 1946.

The appellant in this present petition does not attack the right of the Texas court to correct its records, but contends and shows, that due to the correction, that his sentence was increased by a term of five (5) years, contrary to the law and outstanding authorities of the United States courts.

To properly understand appellant's position, the original judgments issued December 11, 1939, and the corrected judgments issued February 6, 1945, are hereinafter set out in part.

The original judgment in Case No. 1335, issued December 11, 1939, and signed by the sentencing judge, read in part (Tr. R. No. 11,163, p. 13) :

“For the period of five (5) years, said sentence to run consecutive with sentence of five (5) years this day imposed in Case No. 1166, of the Texarkana Division.”

In Case No. 1166, as evidenced by the signed judgment of the court (Tr. R. No. 11,163, p. 21), the trial judge sentenced the appellant as follows:

“For a period of five (5) years, said sentence to run consecutive with sentence of five (5) years this day imposed in Case No. 1335, of the Jefferson Division.”

After the proceedings held on the 29th day of January, 1945, in the Texas court, and on February 6, 1945, the Texas court entered two new judgments. In Action No. 1335, the courts corrected the judgment previously entered on December 11, 1939, to read in effect that this appellant was sentenced to imprisonment for five (5) years and fined One Hundred (\$100.00) Dollars. This corrected judgment differed from the original judgment in that it failed to state in any way when it was to start or how it was to run with or to the judgment in Case No. 1166. (Tr. R. No. 11,163, p. 52.)

In Action No. 1166, the judgment previously entered on December 11, 1939, was corrected to read:

“It is further ordered that the sentence imposed in this shall run consecutive to the sentence this day imposed against this defendant in Criminal No. 1335, of the Jefferson Division; that is, the service of the sen-

tence in this case by the defendant shall begin at the expiration of the service of the sentence imposed in Criminal No. 1335, of the Jefferson Division." (Tr. R. No. 11,163, p. 48.)

The appellant contends that, the latter judgments issued February 6, 1945, compared to the original judgments issued December 11, 1939, definitely show an increase of sentence by a term of five (5) years, contrary to the law and outstanding authorities of the United States courts.

At the time of the filing of this present petition, the appellant was within the actual prison walls of Alcatraz. On September 10, 1947 this appellant was released under the Conditional Release Law, Title 18, U. S. C. A., Sec. 716b. Upon the release of this appellant under the above cited statute the respondent herein forced the appellant to return to the Eastern District of Texas. Under this Conditional Release Law the appellant still remains in the custody of the respondent, James A. Johnston, until the expiration of the sentence he was committed to serve, to-wit: December 10, 1947.

ARGUMENT

1. The original judgments and sentences in Action No. 1166 and in Action No. 1335, issued December 11, 1939, were concurrent sentences.

To show an increase of sentence, the appellant must first show that the original judgments issued on December 11, 1939 (Tr. R. No. 11,163, pp. 13, 21), heretofore set out in part were concurrent sentences, and he contends that the

following cases definitely support the correctness of this contention. See the following cases:

- Aderhold v. McCarthy*, 65 F. (2d) 452;
Biddle, Warden, etc. v. Hall, 15 F. (2d) 840;
Bledsoe v. Johnston, 154 F. (2d) 458;
Downey v. United States, 91 F. (2d) 223;
Ex Parte Gafford, 83 Am. St. Rep. 568, 12 L. R. A. (U. S.) 124;
In re Breton, 79 Am. St. Rep. 335;
In re Fegler (No. 25741), 36 Fed. Supp. 88;
Puccinelli v. United States (9th Cir.), 5 F. (2d) 6;
United States v. Patterson, 29 F. 775;
U. S. ex rel Chasteen v. Denmark, 138 F. (2d) 289.

In *Chasteen v. Denmark*, *supra*, it is said:

"It is true that where a defendant is sentenced upon different indictments, the correct method of entering judgment is not for the total time in gross, but for a specified time under each indictment, that time under the second to commence when the first ends. (Cases cited.) But the judgment entered in a case of cumulative punishment must be of such certainty that the commencement of the second and the termination of the first sentence may be seen from the record."

In the same case, at page 290, the court, speaking of sentences in a criminal case held:

"A sentence in a criminal case should be clear and definite, *Hode v. Sanford*, 5 Cir., 101 F. (2d) 290, and be so complete as to need no construction of a court to ascertain its import. It should be so complete that to ascertain its meaning it will not be necessary to supplement the written words by either a nonjudicial or a ministerial officer. He must find what the

sentencing judge intended from the language which he used."

In the case of *Bledsoe v. Johnston*, 154 F. (2d) 458, it is said by Judge Denman, speaking of the original judgment in this case:

"The controversy here is whether the sentences were to be served concurrently or consecutively. Each sentence signed by the district judge read that it is "to run consecutive with" the other. Obviously, here is no effective judgment for consecutive sentences."

Quoting further from the *Bledsoe case* it is said:

"In the absence of a judgment for consecutive sentence on separate indictments, 18 U. S. C. A. Sec. 709 (a) provides that each sentence shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence; provided, that if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

Judge Denman further said:

"If nothing else were before the court, both sentences were served on December 11, 1944, that is, five years after the imprisonment began in jail, awaiting transportation to the penitentiary."

He, Judge Denman, was speaking here of the corrected judgments, that is, if they were not before the court. But these same judgments were entered several months after the date Judge Denman said appellant had served his sentence to-wit: February 6, 1945.

The marshals' return in each of the original judgments, No. 1166 and No. 1335 (Tr. R. No. 11,163, pp. 14, 23) show that appellant was committed on the same day, and to begin service upon both judgments upon that date.

The appellant earnestly believes that he has shown these judgments and sentences constituted concurrent sentences, valid for a term of five (5) years. These written and signed judgments are the true sentence of the court—see Rule 1 of the Rules of Criminal Procedure, After Plea of Guilty, Verdict or Finding of Guilt. This Rule 1 makes it mandatory for a written and signed judgment by providing in part:

“The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.”

In further support of this Rule 1 see also *Miller v. Sanford*, 161 F. (2d) 291.

The court below in the order denying appellant's petition for writ of habeas corpus (Tr. R. No. . . , p. . .), relied upon *Bledsoe v. Johnston*, 154 F. (2d) 458, and to support that line of action cited *Swihart v. Johnston* (C. C. A. 9), 150 F. (2d) 721. In *Bledsoe v. Johnston*, *supra*, it is stated that:

“The sentencing court has the power so to correct the judgments after the term of the longest sentence has been served if the correction be based upon entries on the rough docket of the court.” Citing *Puccinelli v. United States*, 5 F. (2d) 6, 7; *United States v. Patterson*, 29 F. 775, 779.

The appellant has no quarrel with the right of the Texas court to correct its records to speak the truth. Nor does he

have any quarrel with the authorities cited, but the *Puccinelli v. United States*, *supra*, was decided April 27, 1925, and the *United States v. Patterson*, *supra*, was decided January 31, 1887. At the time of these decisions there was no requirement for a written and signed judgment. Without a written and signed judgment, it is quite natural and reasonable that for a court to correct its sentences, it would, in fact, be forced to base the correction upon the entries on the rough docket of the court, and notes taken by the clerk. Long after the *Patterson* and *Puccinelli* cases, the heretofore cited Rule 1 was adapted and came into effect September 1, 1934, requiring and making mandatory a written and signed judgment. A written and signed judgment is a judicial act and is the truth itself and is controlling.

In the order denying appellant's petition for a writ of habeas corpus, the court below said:

"The grounds alleged in this instant petition are the same as those heretofore alleged in petitioner's prior application, and although *res judicata* does not apply in habeas corpus proceedings, a prior refusal to discharge on a like application may be considered and given controlling weight. *Swihart v. Johnston* (C. C. A. 9), 150 F. (2d) 721."

The appellant is familiar with the *Swihart* case but does not deem it necessary to argue it here, as this present court modified its own opinion, in the *Swihart* case, later in the case, *Kerr v. Squire*, 151 F. (2d) 308, 310.

In the *Kerr v. Squire*, *supra*, following the rule in the case of *Waley v. Johnston*, 316 U. S. 101, Judge Denman said:

"The adjudication of a prior petition for release from imprisonment for the same crime, does not make

res judicata any matters there decided, much less make adjudicated all the rights to release which could have been but were not presented in that prior petition. *Waley v. Johnston*, 316 U. S. 101."

In *Bledsoe v. Johnston*, *supra*, there is no ruling as to whether the correction constituted an increase of sentence by five (5) years. It only rules that a court can correct its records. The contention raised by appellant here has not been adjudicated, and appellant respectfully urges this Honorable Court to rule upon the contention.

2. The judgments and sentences entered February 6, 1945 constitute an increase of sentence contrary to law.

The appellant contends that he has shown without a doubt, by law and authorities cited heretofore, that the original judgments issued December 11, 1939, were concurrent and valid sentences for a term of five (5) years. There certainly cannot be a doubt about appellant now being held for a term of ten (10) years on the authority of the judgments issued February 6, 1945. This five (5) year increase of sentence is contrary to all law that appellant has been able to find.

The appellant relies strongly upon the case of *Rutledge v. United States*, 146 F. (2d) 199, quoting from the *Rutledge case* at page 200, Circuit Court Judge Holmes said:

"The attempted correction of the second sentence to provide that it should begin upon the expiration of the first sentence increased by two years the period of penitentiary service imposed upon appellant. The Federal courts have no power to increase a sentence fixed by a valid judgment." *Ex Parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *United States v. Mayer*, 235 U. S. 55,

35 S. Ct. 16, 59 L. Ed. 129; Ex Parte United States, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178 Ann. Cas. 1917B, 335; United States v. Benz, 282 U. S. 304, 51 S. Ct. 113, 75 L. Ed. 354; Roberts v. United States, 5 Cir., 131 F. (2d) 392.

See also,

"It seems to be well established that a trial court is without power to set aside a sentence after a defendant has been committed thereunder, and impose a new or different sentence, increasing the punishment, even at the same time at which the original sentence was imposed. A judgment which attempts to do so is void and the original judgment remains in force." (44 A. L. R. 1203, and cases cited.)

And

"A sentence which has been partly executed cannot be set aside or changed by the trial court so as to increase the punishment after the end of the term of court at which it was rendered." (44 A. L. R. 1204 and cases cited.)

Under the law, as heretofore cited, the judgments and sentences entered February 6, 1945, are void; and the first judgments issued December 11, 1939, are in full force and effect, and are valid sentences for a term of five (5) years and the appellant has executed these concurrent sentences in full.

This appellant was released September 10, 1947, under the Conditional Release Law, Title 18 U. S. C. A., Sec. 716b. Although the appellant is outside the prison walls, this case does not become moot. A prisoner released under the Conditional Release Law is treated as on parole until the expiration of the maximum term. A parole is merely

an extension of the prison walls. As the appellant is now being held for a ten (10) year term, his date of discharge is December 10, 1949.

"The status of a prisoner while under conditional release is that of a prisoner on parole, and in legal effect is 'imprisonment,' notwithstanding that the punishment is ameliorated. U. S. ex rel Nickolson v. Dillard, C. C. A. Va., 1939, 102 F. (2d) 94."

CONCLUSION

Because, therefore, the sentences originally imposed on this appellant on December 11, 1939, failed to notify this appellant or the warden of the penitentiary in which he was confined, or supplied any means of their knowing which of the two sentences the appellant was serving during the first five (5) years of his imprisonment; because said original sentences failed to specify the order of sequence of said sentences; because a prisoner is entitled to know under which sentence he is imprisoned; because said original judgments, by providing that each sentence was to run "consecutive with" the other is incapable of application; and because those judgments were final, appellant respectfully submits that the judgments created, in legal effect, concurrent sentences, and any reference to "consecutive" sentences therein contained were void as incapable of application.

Because when appellant was originally delivered to both the County jail and the United States penitentiary, he was so delivered to commence serving both sentences as imposed by the two judgments and so committed to serve both sentences on December 11, 1939, and therefore, when appel-

lant filed his first, second and present petition for writ of habeas corpus and when the proceedings to correct the record was held at Paris, Texas, January 29, 1945, the appellant had already completely served both sentences imposed by the original judgments signed by the trial judge on December 11, 1939; because, when the judge at Paris, Texas, entered the judgments of February 6, 1945, he, the trial judge increased the appellant's punishment by five (5) years; and because the trial judge had no power to increase the appellant's punishment, the appellant respectfully submits that the judgments issued February 6, 1945, in the Texas court, are each void and of no legal effect.

For the several and various reasons herein set forth, it is most respectfully submitted that the order appealed from be reversed and appellant ordered discharged from the custody of the appellee.

Dated ²⁰⁷~~September~~ ⁵⁹....., 1947.

Respectfully submitted,

.....
BILLY BERNARD BLEDSOE,
Appellant pro. se.

No. 11715

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDGAR A. SADLER,

Appellant,

vs.

CLARENCE T. SADLER,

Appellee.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 336

Upon Appeal from the District Court of the United States
for the District of Nevada

No. 11715

United States
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Acceptance of Service.....	114
Amended Complaint.....	48
Amendment to Amended Complaint.....	56
Answer of Defendant Edgar A. Sadler to Plaintiff's Amended Complaint.....	62
Bond for Costs on Appeal.....	104
Certificate of Clerk, U. S. District Court.....	120
Complaint	2
Exhibit A—Will of R. Sadler.....	8
B—Complaint of Action to Quiet Title	12
C—Stipulation	18
D—Decree	23
I—Deed	34
L—Agreement	41
Decision on Motion to Dismiss Complaint, or to Strike a Portion Thereof, and to Make More Definite	47

INDEX	PAGE
Decision on Separate Appearance and Notice of Motion by Defendant, Edgar A. Sadler, to Dismiss Plaintiff's Complaint.....	61
Designation of Record.....	115
Exhibits, Defendants':	
C—Real Mortgage, Earl Sadler and Alfred Sadler to Washoe County Bank, 3/2/18	538
D—Counterclaim of Louisa Sadler.....	544
E—Counterclaim of Louisa Sadler, Administratrix of the Estate of Reinhold Sadler, Deceased.....	550
F—Counter Claims of Edgar Sadler.....	555
H—Certificate of Brand Recording.....	562
K—Letter Alfred to Edgar 9/13/37.....	565
F-1—Certified Copy of Deed from Reinhold and Louisa Sadler to Diamond Valley Land & Stock Co. Dated 4/25/85.	602
Exhibits, Plaintiff's:	
No. 5—Letter 5/30/17 "Dear Brother" /s/ Edgar Sadler.....	150
6—Letter 1/16/18 "Dear Brother" /s/ Edgar Sadler.....	153
7—Letter to Alfred Sadler /s/ Edgar	156
9—Power of Attorney, Edgar Sadler to Alfred Sadler dated 12/26/24	163

INDEX

PAGE

Exhibits, Plaintiff's (Continued):

14—Letter 4/8/23 "Dear Alfred"....	169
17—Inventory and Appraisement.....	204
18—Proof of Claim of Minnie C. Sadler Against Estate of Reinhold Sadler	213
19—Letter 3/18/18 Alfred Sadler /s/ H. U. Castle.....	220
20—Letter to Alfred Sadler from Mrs. Louisa Sadler 2/29/18.....	282
21—Letter to Clarence Sadler from Henderson 1/22/16.....	252
22—Letter to Alfred Sadler 4/4/25...	292
24—Letter to Clarence Sadler from Alfred 9/14/27	299
25—Letters: Edgar Sadler to Alfred 12/22/28; Alfred to Clarence 1/18/29	303
26—Letter Edgar to Clarence 4/3/29..	307
27—Letter Alfred to Clarence, Reba and Bruce 3/8/31.....	311
28—Letter to Clarence 4/6/31 /s/ Alfred	316
29—Letter Alfred to Clarence 4/11/31.	321
30—Letter Alfred to Clarence 5/8/31..	325

INDEX

PAGE

Exhibits, Plaintiff's (Continued):

31—Letter Alfred to Clarence 5/20/31	329
32—Letters: Ethel to Alfred 6/7/31; Alfred to Clarence 6/16/31....	332
33—Letter Alfred to Clarence 8/6/25.	346
34—Letter Edgar to Alfred 9/15/33..	352
35—Letter Alfred to Clarence 11/23/33	355
36—Letter to Edgar Sadler 11/22/33 /s/ L. F. Hatch.....	361
37—Letter Alfred to Clarence 10/9/37.	364
38—Letter Alfred to Clarence 10/18/37	367
39—Letter to W. R. Hooper 9/24/37 from Alfred R. Sadler.....	370
43—Letter Alfred to Clarence 8/8/30..	682
Judgment and Decree.....	99
Minutes of Court Sept. 17, 1946.....	80
Names and Addresses of Attorneys of Record..	1
Notice of Motion by Defendant Edgar A. Sadler to Dismiss Plaintiff's Amended Complaint and, Subject Thereto, for Summary Judgment	77
Notice of Appeal to the Circuit Court of Appeals Under Rule 73 (b).....	103
Order Extending Time to Docket and File Record in Circuit Court of Appeals.....	120

INDEX	PAGE
Opinion and Findings of Fact and Conclusions of Law.....	81
Conclusions of Law.....	95
Findings of Fact.....	88
Order for Transfer of Original Exhibits to Appellate Court.....	119
Separate Appearance and Notice of Motion by Defendant, Edgar A. Sadler, to Dismiss Com- plaint, or, in the Alternative, to Strike a Por- tion Thereof, and to Make More Definite....	42
Separate Appearance and Notice of Motion by Defendant, Edgar A. Sadler, to Dismiss Plaintiff's Amended Complaint.....	57
Statement of Docket Entries of June 19, 1947..	97
Statement of Points on Which Appellant In- tends to Rely on Appeal.....	106
Stipulation	117
Order 8/1/47.....	118
Transcript of Testimony.....	122
Witnesses, Defendants':	
Eccles, John	
—direct	441
—cross	452
—redirect	456
Sadler, Clarence	
—cross	669

	INDEX	PAGE
Witnesses, Defendants' (Continued):		
Sadler, Edgar		
—direct	564
—cross	647
—redirect	656
Sadler, Mrs. Ethel		
—direct	456, 663
—cross	484
—redirect	491
Sadler, Floyd		
—direct	513, 677
—cross	535
Sadler, Reinhold		
—direct	494, 667
—cross	511, 668
—redirect	669
Witnesses, Plaintiff's:		
Kirk, Paul F.		
—direct	170
—cross	185, 197
Sadler, Clarence		
—direct	249, 301
—cross	376

INDEX

PAGE

Witnesses, Plaintiff's (Continued):

Sadler, Doris Reba

—direct 425

Sadler, Edgar (Adverse)

—Examined by Thompson.....

.....130, 157, 216, 243

Examined by Cooke..... 228

Sadler, Kathryn

—direct243, 428

—cross 246

Witnesses, Rebuttal:

Sadler, Clarence

—direct 680

—cross 688

Sadler, Edgar

—direct 690

—cross 692

Sadler, Kathryn

—direct 694

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

H. R. COOKE,
First National Bank Building,
Reno, Nevada,

JOHN D. FURRH, JR.,
First National Bank Building,
Reno, Nevada,

Attorneys for Appellant.

MESSRS. SPRINGMEYER & THOMPSON,
First National Bank Building,
Reno, Nevada,

Attorneys for Appellee. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the District of Nevada

No. 371

CLARENCE T. SADLER, on behalf of himself
and all other persons similarly situated who
choose to join as plaintiffs and share the ex-
penses of the litigation,

Plaintiff,

vs.

EDGAR A. SADLER and KATHRYN POWERS
SADLER, as Administratrix of the Estate of
Alfred R. Sadler, deceased,

Defendants.

COMPLAINT

Comes Now the plaintiff, on behalf of himself
and all other persons similarly situated who choose
to join as plaintiffs and share the expenses of the
litigation, and for cause of action alleges:

1. Plaintiff is a citizen of the State of Cali-
fornia, and defendants are citizens of the State of
Nevada. The matter in controversy exceeds, ex-
clusive of interest and costs, the sum of three thou-
sand dollars.

2. Reinhold Sadler, at the time of his death on
January 29, 1906, was the owner of and in the
possession of certain shares of stock in the Hunt-
ington Valley Stock and Land Company, a corpo-
ration, and in the Diamond Valley Livestock [2]

and Land Company, a corporation, and also was the owner of and in the possession of certain real and personal property in the State of Nevada, among which were what is known as the Diamond Valley ranch in Eureka County, Nevada, and the appurtenances also livestock, ranch equipment and other personal property upon said ranch.

Said Reinhold Sadler left a will leaving his property to his widow, Louisa Sadler, and to his five children, namely Wilhelmina Sadler Plummer, Edgar A. Sadler, Alfred R. Sadler, Bertha L. Sadler and Clarence T. Sadler. The said will, a copy of which is attached hereto and made a part hereof as Exhibit A, was filed for probate in the First Judicial District Court in the State of Nevada, in and for the County of Ormsby, on March 24, 1906, and letters of administration thereon duly were granted to Louisa Sadler, who duly qualified as executrix. Said Louisa Sadler died intestate on August 6, 1923. Said Bertha L. Sadler died intestate on April 29, 1921. Said Alfred R. Sadler died on March 5, 1944. On March 27, 1944, letters of administration upon the estate of said Alfred R. Sadler were granted to Kathryn Powers Sadler, who duly qualified as such administratrix, and ever since said date has been and still and now is the administratrix of the estate of said Alfred R. Sadler, deceased. Wilhelmina Sadler Plummer died on September 5, 1903.

3. On or about December 31, 1915, a complaint was filed in the District Court of the Fourth Judi-

cial District of the State of Nevada, in and for the County of Elko, by Huntington and Diamond Valley Stock and Land Company, a corporation, against the Huntington Valley Stock and Land Company, a corporation, the Diamond Valley Livestock Company, a corporation, Louisa Sadler, administratrix of the estate of Reinhold Sadler, [3] deceased, Louisa Sadler, Edgar A. Sadler, Bertha L. Sadler, Alfred R. Sadler, Clarence T. Sadler and others to quiet title to certain lands and the appurtenances, in Eureka County, Nevada, known as the Diamond Valley Ranch. A copy of the said complaint is attached hereto and made a part hereof as Exhibit B.

4. On or about February 14, 1918, a stipulation was entered into between plaintiff and defendants in said action whereby it was stipulated that the legal title to the said lands and property be transferred to Edgar A. Sadler and Alfred R. Sadler upon the payment of \$15,000 to plaintiff in said action. A copy of the said stipulation is attached hereto and made a part hereof as Exhibit C.

Thereafter and on or about March 2, 1918, a judgment and decree duly was entered in said action ordering that the said property be transferred to defendant Edgar A. Sadler and to Alfred R. Sadler. A copy of said decree is attached hereto as Exhibit D.

5. On the date that said judgment and decree was made and entered, namely on or about March 2,

1918, Hermann J. Sadler, as attorney in fact for the Huntington and Diamond Valley Stock and Land Company, a corporation, transferred and conveyed the said property and the appurtenances also all livestock, ranch equipment and other personal property upon said ranch to defendant Edgar A. Sadler and to Alfred R. Sadler. Thereafter and on or about March 12, 1918, the Huntington and Diamond Valley Stock and Land Company duly transferred and conveyed the said real property and appurtenances and the said livestock, ranch equipment and personal property to said defendant, Edgar A. Sadler and Alfred R. Sadler, and the [4] president of said company also conveyed the same to defendant Edgar A. Sadler and to Alfred R. Sadler by deed recorded in the office of the county recorder of Eureka County, Nevada, on March 23, 1918, a true and correct copy of which is attached hereto and made a part hereof as Exhibit I.

6. On or about March 2, 1918, and on the same date that the said judgment and decree was made and entered in the said action, defendant Edgar A. Sadler and Alfred R. Sadler mortgaged the said property and appurtenances to the Washoe County Bank, Reno, Nevada, for the sum of \$16,500, of which the sum of \$1500 was paid to the attorneys for defendants and the balance of \$15,000 was paid to plaintiff in accordance with the terms and provisions of the said stipulation attached hereto and made a part hereof as Exhibit C.

7. On March 2, 1918, that being the date on

which the said decree and on which the said deed was given by Hermann J. Sadler, attorney in fact for the Huntington and Diamond Valley Stock Company conveying the said Diamond Valley Ranch to defendant Edgar A. Sadler and to Alfred R. Sadler, and the date on which the said mortgage was given to the said Washoe County Bank for the said sum of \$16,500, as aforesaid, defendant Edgar A. Sadler and Alfred R. Sadler, for and in consideration of the heirs of Reinhold Sadler entering into the said stipulation, Exhibit C, as aforesaid, duly made and entered into an agreement in writing to hold in trust for the heirs of said Reinhold Sadler, deceased, the said real property and appurtenances known as the Diamond Valley Ranch and also all livestock and other personal property upon said property. A true and correct copy of said agreement is attached hereto and made a part hereof as Exhibit L. [5]

8. Kathryn Powers Sadler, administratrix of the estate of Alfred R. Sadler, deceased, admits that she, under the said agreement, Exhibit L, holds the said Diamond Valley Ranch and the appurtenances, livestock and other personal property in trust as provided in said agreement, Exhibit L. But the defendant Edgar A. Sadler, since the death of Alfred R. Sadler on or about March 5, 1944, has repudiated the trust and refuses and neglects to do anything in relation thereto and claims that he is under no obligation to fulfill the promises made by him in said agreement, Exhibit L, and asserts that

he holds said property free from any claim by plaintiff or by other persons similarly situated, under the terms and provisions of said agreement, Exhibit L. Said Diamond Valley Ranch and appurtenances, livestock, equipment and other personal property now are of the value of in excess of \$100,000.00; within six months last past defendant Edgar A. Sadler has refused and neglected and still and now refuses and neglects to account to or give a statement to plaintiff or to the other beneficiaries of the said trust named in said agreement, Exhibit L, or in any way to give a statement of business transactions, receipts, or disbursements by him on account of or through the terms and provisions of said agreement, Exhibit L.

Wherefore, plaintiff prays judgment:

1. That the defendant, Edgar A. Sadler, account for all properties, real and personal, received by him from, on account of, or through the said agreement, Exhibit L, and that he give an account of all his disbursements in connection with the said properties since the execution of the said agreement, Exhibit L.

2. That defendants Edgar A. Sadler and Kathryn Powers [5] Sadler, as administratrix of the estate of Alfred R. Sadler, deceased, convey and transfer to plaintiff and to all other persons entitled thereto under the terms and provisions of said agreement, Exhibit L, the said Diamond Valley Ranch, with its appurtenances, livestock, ranch equipment, and other personal property.

3. For costs of suit.

4. For such other, further and different relief as may be meet and proper in the premises.

SPRINGMEYER &
THOMPSON,

/s/ GEORGE SPRINGMEYER,

/s/ SALLIE R. SPRINGMEYER,

/s/ BRUCE R. THOMPSON,

Attorneys for Plaintiff. [7]

EXHIBIT A

Eureka, Nevada, September 28th, 1881.

In the name of God, Amen:

I, Reinhold Sadler, of the Town of Eureka, County of Eureka, State of Nevada, Merchant being of sound mind and testament, that is to say:

First. I make, constitute and appoint Hermann J. Sadler of the City of San Francisco, State of California, and Louis Zadow of the town of Hamilton, White Pine County, State of Nevada, executors of this my last will and Testament to act without giving any bond, undertaking or security of any kind, in case of inability of Hermann J. Sadler or Louis Zadow, acting as executors of this my last will and Testament, then, P. A. Wagner of Carson City, Ormsby County, Nevada, to act in either place to manage my estate.

I give to my wife Louisa Sadler and to my children Minnie, Edgar, Alfred, all my property in the following manner: One Third of all my property arising from my estate, either personal or Real, also four life insurance Policies, and the remaining Two Thirds in equal shares to my children, part and share alike. In case of death of either of my children, then I leave the portion to which it would be entitled to remaining ones and my wife share & share alike.

I request the executors of this my last will and Testament to do as they deem best in the matter of my estate, asking them to sell my interest in the business of R. Sadler & Co. immediately and invest all the money arising from such sale and all other moneys coming in their hands on acct, of my estate, to invest the portion due my children and pay it to them at their becoming of age, and to pay to my wife Louisa Sadler, her share as soon as possible.

Should my wife conclude to sell the Homestead wherein we now live, it is my desire and wish that half the amount realized from the sale thereof be given to her and the other half shall be invested by my executors for the benefit of the children.

My interest in the several mines as annexed to this instrument shall be sold whenever H. J. Sadler of San Francisco shall deem it advisable. My interest in the business shall be wound up and sold to the best advantage as my executors may see fit and only the money, after my debts, belonging to said

business, are paid, shall be divided in the several proportions.

In witness whereof I have hereunto set my hand & seal the date and year first above written.

R. SADLER.

Subscribed to by the testator R. Sadler, in the presence of each of the undersigned. The said Testator at the time of subscribing to said will declared the same to be his last will and Testament and we in his presence and in the presence of each other and at the request of said Testator here subscribe our names as witnesses.

D. H. HALL,

W. P. STEICHELMAN.

Since this will being made a child was born to my wife and she is to share, share & share alike under the provisions of this will with the other children.

Eureka, June 6, 1885.

R. SADLER.

Eureka, Nev., June 12, 1891.

Since the within will has been made a boy having been born he is entitled under my will for his share like the balance of my children.

R. SADLER.

[Endorsed]: Last will & Testament of R. Sadler. Eureka, Nev., September 28th, 1881. [8]

Schedule 1

Interest in business as appears by

inventory on Aug. 15.....	\$37,788.38
H. Vorberg, property.....	8,500.00
Elko Mine, White Pine Co.....	1,000.00
Atlantic & Pacific Stock.....	1,000.00
Macon City Mine, Lone Pine Mine, Morning Star Mine, Sunsett Mine, Battery Mine, Sanches Mine.....	7,500.00
Latest Discovery	
Dwelling house & Lot.....	5,000.00
Cash on hand in hands of Mau, Sadler & Co.	2,000.00

\$65,632.38

Interest in R.Rd. stock to be issued,
see Rives, no value yet.

Due Paxton & Co.	\$ 4,000.00
Due Louis Zadow.....	2,000.00
Due Wm. Zadow.....	1,500.00
Life Insurance Policies.....	15,500.00

\$82,132.38

Less Liabilities 7,500.00

\$74,632.38

Eureka, Sept. 28th, 1881. [9]

EXHIBIT B

In the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko

HUNTINGTON AND DIAMOND VALLEY
STOCK AND LAND COMPANY, a Corporation,

Plaintiff,

vs.

THE HUNTINGTON VALLEY STOCK AND
LAND COMPANY, a Corporation, THE DIAMOND VALLEY LIVESTOCK AND LAND
COMPANY, a Corporation, LOUISA SADLER, Administratrix of the Estate of Reinhold Sadler, Deceased, LOUISA SADLER, EDGAR SADLER, BERTHA SADLER, ALFRED SADLER, CLARENCE SADLER, ELDRED G. WINNIE, HARVEY CARPENTER, W. J. TOWNSEND, JOHN DOE, RICHARD ROE, JOHN DOE COMPANY, a Corporation, and JOE DOE COMPANY,

Defendants.

COMPLAINT OF ACTION TO QUIET TITLE

Now comes the Plaintiff in the above entitled action, and for ground of Complaint, alleges:

I.

That the Plaintiff is a Corporation duly organized and existing under and by virtue of the laws

of California, and doing business in the State of Nevada.

II.

That the Plaintiff Corporation is now and for a long time hitherto has been, the owner and entitled to the possession of those certain lots, pieces and parcels of land situate, lying and being in the County of Eureka, State of Nevada.

Township number 24 North, Range 52 East,
Mount Diablo Base and Meridian;

Section 12; $E\frac{1}{2}$ of $NE\frac{1}{4}$,

Section 13; $NE\frac{1}{4}$, $S\frac{1}{2}$, $SW\frac{1}{4}$ of $NW\frac{1}{4}$;

Section 23; $E\frac{1}{2}$ of $E\frac{1}{2}$

Section 24; All of Section 24

Section 25; $N\frac{1}{2}$, $N\frac{1}{2}$ of $S\frac{1}{2}$

Section 26; $E\frac{1}{2}$ of $NE\frac{1}{4}$.

Township number 24 North, Range 53 East,
Mount Diablo Base and Meridian;

Section 17, $SW\frac{1}{4}$ of $SW\frac{1}{4}$

Section 18, $SW\frac{1}{4}$, $W\frac{1}{2}$ of $SE\frac{1}{4}$, $SE\frac{1}{4}$ of $SE\frac{1}{4}$;

Section 19, $W\frac{1}{2}$, $W\frac{1}{2}$ of $E\frac{1}{2}$

Section 20, $SW\frac{1}{4}$ of $NW\frac{1}{4}$ of $NW\frac{1}{4}$

Section 30, $N\frac{1}{2}$

Together with all the water of Big Shipley Springs, flowing or to flow to over, or through said lands hereinabove described; together with all water, water rights, dams, ditches, flumes, water ways and privileges used for the irrigation of said lands [10] from said springs; together with all of

those certain springs situate in the N.E. $\frac{1}{4}$ of Section 26, Township 24 North, Range 52 East, flowing or to flow to, over or through said lands hereinabove described; together with all the water, water rights, dams, ditches, flumes, waterways and privileges, used for the irrigation of said lands hereinabove described, from said springs. (Other lands.)

III.

Plaintiff alleges that The Huntington Valley Stock and Land Company, a corporation, The Diamond Valley Live Stock and Land Company, a Corporation, and the Eastern Nevada Investment Company, a Corporation, are all Corporations duly organized and existing under and by virtue of the laws of Nevada.

IV.

Plaintiff alleges that on the 24th day of March, 1906, the Will of Reinhold Sadler, Deceased, was admitted to probate in the County of Ormsby, State of Nevada, by an Order duly entered and made by the District Court of the First Judicial District, of the State of Nevada, in and for the County of Ormsby, and thereafter, Louisa Sadler was duly appointed administratrix with the will annexed, of the Estate of Reinhold Sadler, Deceased, by said Court.

That she thereafter qualified as such administratrix, and ever since has been, and now is the duly appointed, acting and qualified, administratrix of the Estate of Reinhold Sadler, deceased.

That said Reinhold Sadler died in said year in the County of Eureka, State of Nevada, leaving real and personal estate situated in the County of Ormsby, State of Nevada.

V.

Plaintiff alleges that the defendants herein claim an interest adverse to it in the above lands, and in all of said waters of said Creeks and Springs, flowing or to flow to, over or through said lands, and in and to all water, water rights, dams, ditches, flumes, water ways and the privileges used upon said creeks, and in or from or about said springs for the irrigation of said lands, and in all of said improvements on said lands, and that said claim is without any right whatsoever, and that said defendants have not any estate, right, title or interest whatever in said lands, premises, or any part thereof, or in or to said waters of said creeks or springs, flowing or to flow to, over, or through said lands, or any part thereof, or in or to said water, water rights, dams, ditches, flumes, water-ways, or privileges used upon said creeks, or in or from or about said springs for the irrigation of said lands; That the claim of the defendants operates as, and is a cloud upon the title of the plaintiff to said lands and premises, and to said water, water rights, dams, ditches, flumes, water ways and privileges used upon said creeks, or in or about or from said springs for the irrigation of said lands, and defendants threaten to continue and do continue to set up and claim title to said lands and premises,

and to said waters of said creeks, springs, adverse to Plaintiff, and the creeks and springs referred to in this paragraph of this complaint are the identical creeks and springs enumerated in subdivision two (2) of this complaint and the waters [11] of said creeks, and springs, and the water, water rights, dams, ditches, flumes, water ways and privileges are the identical waters, water rights, dams, ditches, flumes, waterways and privileges enumerated in subdivision two (2) of this complaint.

VI.

Plaintiff alleges that it is ignorant of the true names of the defendants, John Doe, Richard Roe, John Doe Company, a Corporation, and John Doe Company, and asks this Honorable Court that when the true names of said Defendants are discovered, that this complaint may be amended so that said true names may be substituted in place of the fictitious names of said unknown defendants.

Wherefore, Plaintiff prays:

I.

That Plaintiff be decreed to be the lawful owner in fee of the premises, and entitled to the possession thereof.

II.

That the Defendants may be required to set forth the nature of their claims, and that all adverse claims of the defendants may be determined by the decree of this Court.

III.

That by said decree, it shall be declared and adjudged that the Defendants have no estate of interest whatever in or to said lands or premises.

IV.

That the defendants be forever enjoined and debarred from asserting any claim in or to said lands and premises, adverse to the Plaintiff, and for such other relief as to this Honorable Court shall seem meet and agreeable to equity, and for its costs of suit.

HENDERSON AND CAINE,
R. C. VAN FLEET,

Attorney for Plaintiff.

State of Nevada,
County of Elko—ss.

Hermann J. Sadler, being first duly sworn, deposes and says: that he is the Vice President of the Corporation Plaintiff in the above entitled action; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are herein stated on information and belief, and that as to those matters, he believes it to be true.

HERRMANN J. SADLER.

Subscribed and sworn to before me this 31st day of December, A. D. 1915.

[Seal]

MORLEY GRISWOLD. [12]

EXHIBIT C

In the Fourth Judicial District Court of the State
of Nevada, in and for the County of Elko

No. 2380

HUNTINGTON AND DIAMOND VALLEY
STOCK AND LAND COMPANY, a corpo-
ration,

Plaintiff,

vs.

THE HUNTINGTON VALLEY STOCK AND
LAND COMPANY, a corporation, THE DIA-
MOND VALLEY LIVESTOCK AND LAND
COMPANY, a corporation, EASTERN NE-
VADA INVESTMENT COMPANY, a corpo-
ration, LOUISA SADLER, administratrix of
the Estate of Reinhold Sadler, Deceased,
LOUISA SADLER, EDGAR SADLER,
BERTHA SADLER, ALFRED SADLER,
CLARENCE SADLER, ELDRED G. WIN-
NIE, HARVEY CARPENTER, W. G.
TOWNSEND, JOHN DOE, RICHARD ROE,
JOHN DOE COMPANY, a corporation, and
JOHN DOE COMPANY,

Defendants.

STIPULATION

Know All Men by These Presents that the under-
signed do hereby stipulate and consent that judg-
ment may be entered in the above entitled action,
as follows:

1. That it be adjudged and decreed that the defendants, Edgar Sadler and Alfred Sadler, are the owners and entitled to the possession of all the property described in plaintiff's complaint, which is situate in the County of Eureka, State of Nevada, and known as the Diamond Valley Ranch, a more particular description of said property to be inserted in said decree, their title thereto quieted, and that none of the other parties to this action have any right, title or estate in said property, or any part thereof.

2. That the plaintiff be adjudged the owner and entitled to the possession of all the rest of the lands and premises [13] described in plaintiff's complaint, its title thereto quieted, and that none of the other parties to this action have any right, title or estate in said property, or any part thereof.

3. That the defendants take nothing by their several counter-claims.

4. That the money to be paid by the said Edgar Sadler and Alfred Sadler to the plaintiff as a consideration for this settlement and decree, shall be solely the obligation of said Edgar Sadler and Alfred Sadler, and that none of the parties hereto shall be in any wise personally liable therefor.

5. That each party to this action pay its or their own costs herein.

6. That judgment be entered in accordance with this stipulation, and that our attorneys in said action and said Edgar Sadler and said Alfred Sad-

ler are authorized to take such proceedings and execute any and all papers necessary and proper to carry this stipulation into full force and effect.

Dated: February 14, 1918.

CLARENCE SADLER,

By ALFRED R. SADLER,

His Attorney in Fact,

LOUISA SADLER,

As Administratrix of the
Estate of Reinhold Sadler,
deceased,

LOUISA SADLER,
BERTHA L. SADLER,
EDGAR SADLER,
ALFRED R. SADLER,

HUNTINGTON & DIAMOND
VALLEY STOCK &
LAND CO.,

By HERMANN J. SADLER,

Vice Pres. and
Attorney in Fact,

CAREY VAN FLEET,
CHAS. B. HENDERSON,

Attys. for Plaintiff. [14]

In the Fourth Judicial District Court of the State
of Nevada, in and for Elko County

Endorsed: No. 2380

HUNTINGTON AND DIAMOND VALLEY
STOCK AND LAND CO., a corp.,

Plaintiff,

vs.

THE HUNTINGTON VALLEY STOCK AND
LAND CO., a corp., et al.,

Defendants.

STIPULATION

Service of the within by copy, admitted,
191....., Attorneys for

Filed this 2nd day of March, 1918.

M. J. KEITH,

Clerk,

MAE McNAMARA,

Deputy.

CHENEY, DOWNER,

PRICE & HAWKINS,

Reno, Nevada,

Attorneys for

Defendants.

[Certificate attached.]

State of Nevada,

County of Elko—ss.

I, Mae E. Caine, County Clerk and Ex-Officio

Clerk of the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko, do hereby certify that the annexed is a full, true and correct copy of Stipulation in Civil Action No. 2380, Huntington and Diamond Valley Stock and Land Co., a Corp., Pltf., vs. The Huntington Valley Stock and Land Co., et al., Dfts., filed 3/2/18, as the same appears on file and of record in my office.

Witness my hand and the seal of said Court affixed this 22nd day of April, A. D. 1944.

MAE E. CAINE,
Clerk,

By M. K. MAWN,
Deputy Clerk. [15]

EXHIBIT D

In the Fourth Judicial District Court of the State
of Nevada, in and for the County of Elko

HUNTINGTON AND DIAMOND VALLEY
STOCK AND LAND COMPANY, a corpo-
ration,

Plaintiff,

vs.

THE HUNTINGTON VALLEY STOCK AND
LAND COMPANY, a Corporation, THE DIA-
MOND VALLEY LIVE STOCK AND LAND
COMPANY, a corporation, EASTERN NE-
VADA INVESTMENT COMPANY, a corpo-
ration, LOUISA SADLER, Administratrix of
the Estate of Reinhold Sadler, Deceased,
LOUISA SADLER, EDGAR SADLER,
BERTHA SADLER, ALFRED SADLER,
CLARENCE SADLER, ELDRED G. WIN-
NIE, HARVEY CARPENTER, WILLIAM
SPINNER, W. J. TOWNSEND, JOHN DOE,
RICHARD ROE, JOHN DOE COMPANY,
a corporation, and JOHN DOE COMPANY,

Defendants.

DECREE

This cause having this day been regularly brought
on for hearing, upon the amended complaint, an-
swer, counter-claims, and the stipulation of the
parties, filed herein, and it having been stipulated

by and between the plaintiff and defendants, Louisa Sadler in her individual capacity, Louisa Sadler, as administratrix of the Estate of Reinhold Sadler, Deceased, Edgar Sadler, Bertha Sadler, Alfred Sadler, Clarence Sadler, and their respective attorneys, that judgment be entered in accordance with the stipulation on file herein, and the Court having heard the evidence of witnesses and the muniments of title of Huntington and Diamond Valley Stock and Land Company having been admitted into evidence, and the law and premises having been heard and understood by the Court herein, and the Court being fully apprised of the matters in said action brought before it, [16]

It is now Ordered, Adjudged and Decreed:

I.

That the defendants, Louisa Sadler, Louisa Sadler, Administratrix of the Estate of Reinhold Sadler, Deceased, and Edgar Sadler, take nothing by their counter-claims heretofore filed in the above entitled action, and that they and each of them be denied the relief prayed for in said counter-claims, and that they be adjudged to be entitled to no counter-claims of whatsoever nature against plaintiff herein.

II.

That the plaintiff have judgment as prayed for in its complaint herein against defendants and each and all of them, quieting title to the premises and water rights hereinafter described; that all adverse

claims of the defendants and each of them, and all persons claiming or to claim said premises or any part thereof, through or under said defendants or either of them, are hereby adjudged and decreed to be invalid and groundless, and that the plaintiff be, and it is hereby declared and adjudged to be the true and lawful owner of the land hereinafter in this paragraph described and every part and parcel thereof, and that its title thereto be adjudged to be quieted against all claims, demands or pretensions of the defendants or either of them, she are perpetually stopped from setting up any claims thereto, or any part thereof. Said premises are bounded and described as follows, to-wit:

Those certain lots, pieces and parcels of land situated, lying and being in the County of Elko, State of Nevada, and more particularly described as follows:

Township Number 27 North, Range number (55) East, Mount Diablo Base and Meridian. [17]

Section Ten (10). The southwest quarter of the southwest quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$).

Section Fourteen (14). The southwest quarter of the southwest quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$).

Section Fifteen (15). The north half of the northwest quarter ($N\frac{1}{2}$ of $NW\frac{1}{4}$) and the southeast quarter of the northwest quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$); the southwest quarter of the northeast quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$); the north half of the southeast quarter ($N\frac{1}{2}$ of $SE\frac{1}{4}$), and the southeast quarter of the southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$).

Section Twenty-two (22). The northwest quarter of the northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$).

Section Twenty-three (23). The west half of the west half ($W\frac{1}{2}$ of $W\frac{1}{2}$). The southeast quarter of the southwest quarter ($SE\frac{1}{4}$ of $SW\frac{1}{4}$).

Section Twenty-five (25). The south half of the south half ($S\frac{1}{2}$ of $S\frac{1}{2}$).

Section Twenty-six (26). The east half of the west half ($E\frac{1}{2}$ of $W\frac{1}{2}$), the southwest quarter of the southwest quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$), the south half of the southeast quarter ($S\frac{1}{2}$ of $SE\frac{1}{4}$), the southwest quarter of the northeast quarter ($SE\frac{1}{4}$ of $NE\frac{1}{4}$).

Section Thirty-four (34). The southeast quarter of the southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$).

Section Thirty-five (35). The northwest quarter ($NW\frac{1}{4}$); the west half of the southwest quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$), and the northeast quarter of the southwest quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$).

Township number 26 North, Range 55 East, Mount Diablo Base and Meridian.

Section Two (2). The northwest quarter of the northwest quarter ($NW\frac{1}{4}$ of $NW\frac{1}{4}$).

Section Three (3). The east half of the east half ($E\frac{1}{2}$ of $E\frac{1}{2}$), the west half of the southeast quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$).

Section Ten (10). The southwest quarter of the southeast quarter ($SW\frac{1}{4}$ of $SE\frac{1}{4}$).

Section Fifteen (15). The west half of the east half ($W\frac{1}{2}$ of $E\frac{1}{2}$), the northeast quarter of the northeast quarter ($NE\frac{1}{4}$ of $NE\frac{1}{4}$).

The following lots, pieces and parcels of land situate, lying and being in the County of White Pine, State of Nevada, and more particularly described as follows: [18]

Township number 26 North, Range number 55 East, Mount Diablo Base and Meridian.

Section Twenty-two (22). The west half of the northeast quarter ($W\frac{1}{2}$ of $NW\frac{1}{4}$), the southeast quarter of the northeast quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$), and the east half of the southwest quarter ($E\frac{1}{2}$ of $SW\frac{1}{4}$).

Section Twenty-seven (27). The east half of the northwest quarter ($E\frac{1}{2}$ of $NW\frac{1}{4}$), the northeast quarter of the southwest quarter ($NW\frac{1}{4}$ of $SW\frac{1}{4}$).

Township number 25 North, Range number 55 East, Mount Diablo Base and Meridian.

Section Two (2). The northwest quarter of the southwest quarter ($NW\frac{1}{4}$ of $SW\frac{1}{4}$).

Section Eleven (11). The east half of the northwest quarter ($E\frac{1}{2}$ of $NW\frac{1}{4}$), the north half of the southwest quarter ($N\frac{1}{2}$ $SW\frac{1}{4}$).

Section Fourteen (14). The east half of the west half ($E\frac{1}{2}$ of $W\frac{1}{2}$).

Section Twenty-three (23). The west half of the east half ($W\frac{1}{2}$ of $E\frac{1}{2}$), the east half of the northwest quarter ($E\frac{1}{2}$ of $NW\frac{1}{4}$).

Section Twenty-six (26). The west half of the northeast quarter ($W\frac{1}{2}$ $NE\frac{1}{4}$), the west half of the southwest quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$).

Section Thirty-four (34). The east half of the northeast quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$), the southwest

quarter of the northeast quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$), the west half of the southeast quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$), the northeast quarter of the southeast quarter ($NE\frac{1}{4}$ of $SE\frac{1}{4}$).

Section Thirty-five (35). The northwest quarter of the northwest quarter ($NW\frac{1}{4}$ of $NW\frac{1}{4}$).

Township number 24 North, Range 55 East, Mount Diablo Base and Meridian.

Section Ten (10). The southeast quarter ($SE\frac{1}{4}$).

The above described lands being more particularly known as the Huntington Valley Ranch, in the Counties of Elko and White Pine, in the State of Nevada; together with all waters of Huntington and Connors Creeks, Huntington Creek being also known as Hamilton Creek, flowing or to flow to, over, or through said lands just described; together with all [19] the water, water rights, dams, ditches, flumes, water-ways, and privileges used upon said creek for the irrigation of said land;

Together with all the waters of Mitchell and Dry Creeks, tributaries of said Huntington and Connors Creeks, flowing or to flow to, over or through said lands; together with all the water, water rights, dams, ditches, flumes, water-ways and privileges used upon said creeks for the irrigation of said lands; subject, however, to the prior right of Charles Mitchell upon said Mitchell Creek, together with all the waters of a certain creek tributary to said Huntington Creek running through the south half of the south half ($S\frac{1}{2}$ of $S\frac{1}{2}$) of Section Twenty-five (25) Township Twenty-seven (27)

North, Range Fifty-five (55) East, M.D.B.&M., in a general westerly direction, and flowing or to flow to, over and through said lands; together with all the water, water rights, dams, ditches, flumes, water-way and privileges used upon said Creek for the irrigation of said lands.

Also all the following pieces and parcels of real property situate, lying and being in the County of White Pine, State of Nevada.

Township number 20 North, Range number 55 East, Mount Diablo Base and Meridian.

Section Fourteen (14). The southeast quarter ($SE\frac{1}{4}$), the south half of the northwest quarter ($S\frac{1}{2}$ NW $\frac{1}{4}$).

Section Fifteen (15). The southeast quarter of the northeast quarter ($SE\frac{1}{4}$ of $NE\frac{1}{4}$).

Township number 18 North, Range number 58 East, Mount Diablo Base and Meridian.

Section Seventeen (17). The southeast quarter of the northwest quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$), the northeast quarter of the southwest quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$). [20]

Section Twenty (20). The southeast quarter of the northwest quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$).

Together with all the waters of Antelope Springs flowing or to flow to, over, or through said lands; together with all the water, water rights and privileges used upon said springs for the irrigation of said lands; together with all the waters of certain springs situated in the Southeast quarter ($SE\frac{1}{4}$) of Section Fourteen (14), Township

Twenty (20) North, Range Fifty-five (55) East, M.D.B. and M., flowing or to flow to, over or through said lands hereinbefore described; together with all the water, water rights and privileges used upon said springs for the irrigation of said lands.

Township number 23 North, Range number 51 East, Mount Diablo Base and Meridian.

Section Thirteen (13). The north half of the southwest quarter ($N\frac{1}{2}$ of $SW\frac{1}{4}$).

Section Fourteen (14). The north half of the southeast quarter ($N\frac{1}{2}$ of $SE\frac{1}{4}$).

Section Twenty-four (24). The west half of the southwest quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$).

Section Twenty-six (26). The northwest quarter of the northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$).

Section Twenty-seven (27). The northeast quarter of the southeast quarter ($NE\frac{1}{4}$ of $SE\frac{1}{4}$).

Township number 24 North, Range number 51 East, Mount Diablo Base and Meridian.

Section Ten (10). The southeast quarter of the southwest quarter ($SE\frac{1}{4}$ of $SW\frac{1}{4}$) and the southwest quarter of the southeast quarter ($SW\frac{1}{4}$ of $SE\frac{1}{4}$).

Section Eleven (11). The northwest quarter of northwest ($NW\frac{1}{4}$ of $NW\frac{1}{4}$).

Section Fifteen (15). The northwest quarter of the northeast quarter ($NW\frac{1}{4}$ of $NE\frac{1}{4}$), the southwest quarter of the northwest quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) and the northeast quarter of the southwest quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$).

Together with all the water of Vanina and Hen-

derson Creeks, flowing or to flow through, over or to said lands herein above described; together with all the water, water rights, dams, ditches, flumes, water-ways and privileges used upon said creeks for the irrigation of said lands; together with all the waters of certain springs situate in the southeast quarter of the southwest quarter ($SE\frac{1}{4}$ of $SW\frac{1}{4}$) and the southwest quarter of the southeast quarter ($SW\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 10, Township 27 North, Range 52 East, M.D.B. & M., flowing or to flow to, over or through said lands herein above described, and used for domestic purposes; and all houses, stables, corrals, sheds, fences and improvements erected upon and attached to any of the lands herein above described, situate in said Counties of Elko, White Pine and Eureka.

III.

It is further ordered, adjudged and decreed that defendants, Edgar Sadler and Alfred Sadler have judgment quieting title to the hereinafter described property, and that all adverse claims of the plaintiff, and all persons claiming or to claim said premises or any part thereof; through or under said plaintiff, are hereby adjudged and decreed to be invalid and groundless, and that said defendants Edgar Sadler and Alfred Sadler be and they are hereby declared and adjudged to be the true and lawful owners of the land that is hereinafter described in this paragraph and every part and parcel thereof, and that their title thereto is adjudged to be quieted against all claims, demands, or preten-

tions of plaintiff, who is hereby perpetually stopped from setting up any claims thereto, or any part thereof. Said premises are bounded and described as follows, to wit:

All those certain parcels and pieces of land situate, lying and being in the County of Eureka, State of Nevada, particularly described as follows:

The east half of the northeast quarter ($E\frac{1}{4}$ of $NE\frac{1}{4}$) of Section Twelve (12); the northeast quarter ($NE\frac{1}{4}$); the south half ($S\frac{1}{2}$); and the southwest quarter of the northwest quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section Thirteen (13); the east half of the east half ($E\frac{1}{2}$ of $E\frac{1}{2}$) of Section Twenty-three (23); all of Section Twenty-four (24); the north half ($N\frac{1}{2}$) and the north half of the south half ($N\frac{1}{2}$ of $S\frac{1}{2}$) of Section Twenty-five (25); and the east half of the northeast quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section Twenty-six (26) all in Township Twenty-four (24) North, Range Fifty-two (52) East, Mount Diablo Base and Meridian.

Also, the southwest quarter of the southwest quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$) of Section Seventeen (17); the southwest quarter ($SW\frac{1}{4}$); the west half of southeast quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$) and the southeast quarter of the southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$), of Section Eighteen (18); the west half ($W\frac{1}{2}$) and the West half of the east half ($W\frac{1}{2}$ of $E\frac{1}{2}$) of Section nineteen (19); the southwest quarter of the northwest [22] quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section Twenty-nine (29); and the north half ($N\frac{1}{2}$) of Section Thirty (30); all in the Town-

ship Twenty-four (24) North, Range Fifty-three (53) East, Mount Diablo Base and Meridian.

Containing approximately three thousand one hundred twenty (3120) acres, and constituting what is commonly known as the Diamond Valley Ranch.

Together with all the waters of the Big Shipley Springs flowing, or to flow to, over or through said lands, hereinbefore described, together with all water, water rights, dams, ditches, flumes, water-ways, and privileges used for the irrigation of said lands from said springs, and also with all of the water of those certain springs, situate in the north-east quarter (NE $\frac{1}{4}$) of Section Twenty-six (26), Township Twenty-four (24) North, Range Fifty-two (52) East, Mount Diablo Base and Meridian, flowing or to flow to, over, or through said lands hereinbefore described, together with all the water, water rights, dams, ditches, flumes, water-ways and privileges used for the irrigation of said land from said springs.

IV.

It is further ordered, adjudged and decreed that this action be dismissed as to Eldred G. Winnie, Harvey Carpenter, W. J. Townsend and William Spinner, who have heretofore been made parties hereto.

V.

It is further ordered, adjudged and decreed and found to be a fact that this court that the Diamond

Valley Live Stock and Land Company, a corporation, heretofore existing under and by virtue of the laws of Nevada, and Huntington Valley Stock and Land Company, a corporation, heretofore existing under and by virtue of the laws of Nevada, have ceased the user of their franchises for a period of over thirty years, and have conveyed all of their property, both real and personal, by mesma conveyances, so the Huntington and Diamond Valley Stock and Land Company, the plaintiff herein, and said corporations are no longer in existence. [23]

VI.

It is further ordered, adjudged and decreed that each of the parties to this action pay its or their own costs herein.

Done in Open Court, this 2nd day of March, 1918.

/s/ E. J. L. TABER,
District Judge. [24]

EXHIBIT I

File 12189

Deed (IR Stamps \$15.00) Cancelled

Huntington and Diamond Valley Stock and Land
Company to Edgar Sadler and Alfred Sadler.

This Indenture made the 12th day of March, in
the year of our Lord one thousand nine hundred

and eighteen, by and between the Huntington and Diamond Valley Stock and Land Company, a Corporation organized and existing under and by virtue of the Laws of the State of California, and doing business in the State of Nevada, the party of the first part, and Edgar Sadler, of the County of Eureka, State of Nevada, and Alfred Sadler, of the County of Washoe, State of Nevada, the parties of the second part,

Witnesseth:

That the said party of the first part did on the 12th of March, 1918, pass the following preamble and resolution: Whereas, under and by virtue of a resolution of this Corporation duly made and entered on the 10th day of September, 1917, said Corporation did duly appoint and constitute Hermann J. Sadler of the County of Elko, State of Nevada, its Attorney-in-Fact under general power of attorney, authorizing the said Hermann J. Sadler, among other powers, to sell and dispose of certain lands situate in Eureka County, in manner and for the consideration which to him should seem for the best interest of said corporation; and

Whereas, the said Hermann J. Sadler, under said power of attorney, did on the 2nd day of March, A. D. 1918, for the consideration of Fifteen Thousand and no/100 Dollars (\$15,000.00), in cash, and other valuable consideration, convey to Edgar Sadler, of the County of Eureka, State of Nevada, and Alfred Sadler, of the County of Washoe, State

of Nevada, the parties of the second part, certain lands and water rights, situate in Eureka County, State of Nevada, and Whereas, said parties of the second part have requested that this Corporation execute a deed of confirmation, confirming in them the titled to lands and water rights in said deed described;

Be it, Therefore Resolved: that the act of Hermann J. Sadler in selling and conveying to the said parties of the second part, the lands and water rights described in the deed of date the 2nd day of March, A. D. 1918, executed by the said Hermann J. Sadler as attorney-in-Fact for this Corporation be confirmed, and that the President and Secretary of this Corporation be and they are hereby authorized and directed to make, execute and deliver to the said Edgar Sadler and Alfred Sadler a deed of confirmation conveying in the name and under the seal of said Corporation the lands and water rights described in said deed of date the 2nd day of March, A. D. 1918, executed by the said Hermann J. Sadler as Attorney-in-Fact for said Corporation;

Now, Therefore, in consideration of the premises and the sum of Fifteen Thousand and No/100 (\$15,000) Dollars, heretofore paid to the said party of the first part by the said parties of the second part, the receipt whereof is hereby acknowledged, the said party of the first part does by these presents grant, bargain, sell, convey and confirm unto and in said parties of the second part, their heirs

and assigns, all those certain pieces and parcels of land situate in the County of Eureka, State of Nevada, and particularly described as follows, to wit:

The East half of the Northeast quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section Twelve (12); the northeast quarter ($NE\frac{1}{4}$); the South half ($S\frac{1}{2}$); and the Southwest quarter of the Northwest quarter ($SW\frac{1}{4}$ of $W\frac{1}{4}$) of Section Thirteen (13); the East half of the West half ($E\frac{1}{2}$ of $E\frac{1}{2}$) of Section Twenty-three (23); all of Section Twenty-four (24); the North half ($N\frac{1}{2}$); and the North half of the South half ($N\frac{1}{2}$ of $S\frac{1}{2}$) of Section Twenty-five (25); and the East half of the Northeast quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section Twenty-six (26), all in Township twenty-four (24) North, Range Fifty-two (52) East, Mount Diablo Base and Meridian; also the Southwest quarter of the Southwest quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$) of Section Seventeen (17); and Southwest quarter ($SW\frac{1}{4}$); the West half of the Southwest quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$), and the Southeast quarter of the Southeast quarter ($SE\frac{1}{4}$ of the $SE\frac{1}{4}$) of Section Eighteen (18); the west half ($W\frac{1}{2}$); and the West half of the East half ($W\frac{1}{2}$ of $E\frac{1}{2}$) of Section nineteen (19); the Southwest quarter of the Northwest quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section twenty-nine (29); and the north half ($N\frac{1}{2}$) of Section Thirty (30); all in Township Twenty-four (24) North, Range Fifty three (53) East, Mount Diablo Base and Meridian; containing approximately Three Thousand one Hundred

Twenty (3120) acres, and constituting what is commonly known as the Diamond Valley Ranch;

Together with all the waters of the Big Shipley Springs flowing, or to flow to, over or through said lands hereinbefore described, together with all water, water rights, dams, ditches, flumes, water-ways and privileges used for the irrigation of said lands from said springs, and also with all of the water of those certain springs situate in the North-east quarter ($NE\frac{1}{4}$) of Section twenty-six (26) Township Twenty-four (24) North, Range Fifty-two (52) East, Mount Diablo Base and Meridian, flowing or to flow to, over or through said lands hereinbefore described, together with all the water, water rights, dams, ditches, flumes, water-ways and privileges used for the irrigation of said lands from said springs;

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To Have and to Hold, all and singular the said premises, together with the appurtenances unto the said parties of the second part, and to their heirs and assigns forever.

In Witness Whereof, the said party of the first part has caused these presents to be executed by the President and Secretary thereunto duly author-

ized, and its official seal to be hereto annexed the day and year in this indenture first above written.

[Corporate Seal]

HUNTINGTON AND
DIAMOND VALLEY STOCK
AND LAND COMPANY,

MINNIE C. SADLER,
President,

ELMER WESTLAKE,
Secretary. [26]

State of California,
City and County of San Francisco—ss.

On this twelfth day of March in the year of our Lord one thousand nine hundred and eighteen, personally appeared before me Marguerite S. Bruner, a Notary Public in and for the City and County of San Francisco, State of California, Minnie C. Sadler, known to me to be the President of the Corporation that executed the foregoing instrument and upon oath did depose that she is the officer of said corporation as above designed and that she is acquainted with the seal of said Corporation and that the seal affixed to said instrument is the corporate seal of said corporation; that the signatures to said instrument were made by officers of said corporation as indicated after said signatures; and that the said corporation executed the said instrument freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my Official Seal at the City and County of San Francisco, State of California, the day and year in this certificate above written.

[Seal] MARGUERITE S. BRUNER,

Notary Public in and for the City and County of
San Francisco, State of California.

Recorded at the request of Cheney, Downer, Price and Hawkins March 23, 1918, at 6 Min. past 11 a.m. in Liber 18 of Deeds, Page 289, Records of Eureka County, Nevada.

EDGAR EATHER,
Recorder.

State of Nevada,
County of Eureka—ss.

I, Edgar Eather, County Recorder and ex officio auditor, in and for said County, do hereby certify that the above and foregoing is a correct and true copy of the original matter thereof, which now remains in my office at Eureka, County and State aforesaid, Deed—Huntington and Diamond Valley Stock and Land Company, to Edgar Sadler and Alfred Sadler.

In witness whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the Town of this 15th Day of July A. D. 1922.

/s/ EDGAR EATHER,
County Recorder. [27]

EXHIBIT L

A Agreement

Dated March 2, 1918

Reno, Nevada, and Carson City, Nevada

This agreement is made between the following persons as follows:

Edgar Sadler of Eureka Co. Nevada
Alfred Sadler of Washoe Co. Nevada
Bertha Sadler of Ormsby Co. Nevada
Mrs. Louise Sadler of Ormsby Co. Nevada
Clarence Sadler of Washington, D. C. By
Alfred R. Sadler thru the Power of Attorney.

That as soon as possible the mortgage on the Diamond Ranch in Diamond Valley, Eureka County, Nevada be lifted the lawyers fees paid and that the first good chance for the best price possible this aforesaid ranch or property be sold and then that the remainder of the money be divided according to the last will and Testament of Reinhold Sadler, deceased——

Mother desired fifty dollars each month that is by the 10th of each month.

A settlement of the ranch cattle with the same terms of the will.

EDGAR SADLER,

ALFRED SADLER.

[Endorsed]: Filed Sept. 6, 1944. [28]

In the District Court of the United States, in and
for the District of Nevada

No. 371

CLARENCE T. SADLER, on behalf of himself
and all other persons similarly situated who
choose to join as plaintiffs and share the ex-
penses of the litigation,

Plaintiff,

VS.

EDGAR A. SADLER and KATHRYN POWERS
SADLER, as Administratrix of the Estate of
Alfred R. Sadler, Deceased,

Defendants.

SEPARATE APPEARANCE AND NOTICE OF
MOTION BY DEFENDANT, EDGAR A.
SADLER, TO DISMISS COMPLAINT, OR,
IN THE ALTERNATIVE, TO STRIKE A
PORTION THEREOF, AND TO MAKE
MORE DEFINITE

The defendant, Edgar A. Sadler, on his own be-
half only, moves the Court as follows:

I.

To dismiss the action as to this defendant because
the complaint fails to state a claim against this
defendant upon which relief can be granted. [29]

II.

To dismiss the action as to this defendant on the

ground that the Court lacks jurisdiction because the complaint fails to allege the amount actually in controversy exceeds \$3,000 exclusive of interests and costs.

III.

In the alternative—to strike the following: Commencing with the word “Kathryn” in line 1, page 5 of said complaint, to and including the word “Exhibit L,” line 5, said page, on the ground the same is redundant; is immaterial; is impertinent.

IV.

In the alternative of dismissal—that plaintiff be required to make a more definite statement of matters which defendant alleges are not averred with sufficient definiteness to enable the defendant to properly prepare his answer or to prepare for trial, and in that behalf defendant specifies:

(a) Whether or not administration was ever had on the estate of Louisa Sadler, who is alleged to have died intestate on August 6, 1923, and, if so, where such administration was had, whether decree of distribution was made, and administration closed.

(b) Whether, after the death of Reinhold Sadler, and in the life-time of Louisa Sadler, she sold the homestead premises referred to in the Will of Reinhold Sadler, Exhibit “A” annexed by copy to the complaint.

(c) Whether or not administration was ever had on the estate of Bertha Sadler, who is alleged to

have died intestate on April 29, [30] 1921, and, if so, where such administration was had, whether decree of distribution was made, and administration closed.

(d) The copy of complaint of Huntington and Diamond Valley Stock & Land Co. vs. Louisa Sadler, administratrix, et al., mentioned in Paragraph 3 of the complaint herein, and annexed to complaint as Exhibit "B"; the stipulation mentioned in Paragraph 4 of the complaint and annexed thereto by copy as Exhibit "C"; the decree mentioned in said paragraph and annexed to said complaint as Exhibit "D," and the deed, Exhibit "I," annexed to said complaint and mentioned in Paragraph 5 thereof—all of them relate only to realty and none at all purport to include livestock or any personal property. But, in Paragraph 5 of the complaint, it is alleged that the Huntington and Diamond Valley Stock and Land Co. conveyed the said realty, "also all livestock, ranch equipment and other personal property upon said ranch" to this defendant and Alfred R. Sadler. But otherwise no conveyance of any livestock, ranch equipment or personal property is alleged. This defendant is unable to determine whether plaintiff intends to claim said personal property was conveyed by the exhibits, or any thereof, annexed to the complaint, or was conveyed by conveyance not pleaded by copy. [31]

(e) It is alleged (complaint, Paragraph 4) that a stipulation, Exhibit "C," annexed to complaint,

was entered into on February 14, 1918, whereby the legal title to the said premises was to be transferred to Edgar A. Sadler and Alfred R. Sadler, said stipulation being on said February 14, 1918, consented to and signed by all the heirs. It is further alleged (complaint, Paragraph 7) that on March 2, 1918, defendant, Edgar A. Sadler and Alfred R. Sadler, in consideration of the heirs entering into said stipulation, executed the alleged agreement, Exhibit "L" to hold said premises and all livestock and other personal property in trust for the heirs of said Reinhold Sadler, deceased, said heirs having previously, to-wit, on February 18, 1918, consented to a conveyance of said "lands and property," this defendant is unable to determine what consideration, if any, the plaintiff claims to have existed for the making of said trust agreement, Exhibit "L."

On the hearing herein, said defendant will use and refer to said complaint and to this Notice of Motion.

Reno, Nevada, October 16, 1944.

/s/ H. R. COOKE,

Attorney for Defendant,
Edgar A. Sadler. [32]

To Messrs. Springmeyer & Thompson, Attorneys
for Plaintiff:

Please Take Notice, that the undersigned will bring the above Motion in for hearing before said

Court on November 6, 1944, at 10:00 a.m., or as soon thereafter as counsel may be heard.

H. R. COOKE,
Attorney for Defendant,
Edgar A. Sadler.

Service, by copy, of the above and foregoing Motion is hereby admitted this 16th day of October, 1944.

SPRINGMEYER &
THOMPSON,

/s/ BRUCE R. THOMPSON.
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 17, 1944. [33]

In the District Court of the United States of
America, in and for the District of Nevada

No. 371

CLARENCE T. SADLER, on behalf of himself
and all other persons similarly situated who
choose to join as plaintiffs and share the ex-
penses of the litigation,

Plaintiff,

vs.

EDGAR A. SADLER and KATHRYN POWERS
SADLER, as Administratrix of the Estate of
Alfred R. Sadler, Deceased,

Defendants.

DECISION ON MOTION TO DISMISS COM-
PLAINT, OR TO STRIKE A PORTION
THEREOF, AND TO MAKE MORE DEFINI-
NITE

The motion of Attorney for Defendant, Edgar A. Sadler, on said Defendant's own behalf only, to dismiss the action as to said Defendant, or, in the alternative, to strike a portion thereof, and to make more definite, having been finally submitted upon briefs filed, and the Court being fully advised in the premises,

It Is Ordered that said motion to dismiss the action as to said Defendant, Edgar A. Sadler, or, in the alternative, to strike a portion thereof, and to make more definite, be, and the same hereby is, as to each respective phase thereof, denied.

It Is Further Ordered that said Defendant have fifteen days from date hereof to file his answer.

Dated: this 17th day of January, 1945.

/s/ FRANK H. NORCROSS,
District Judge.

[Endorsed]: Filed Jan. 18, 1945. [34]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes Now the plaintiff, and files this his Amended Complaint, and for cause of action alleges:

1. Plaintiff is a citizen of the State of California, and defendants are citizens of the State of Nevada. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2. Reinhold Sadler, at the time of his death on January 29, 1906, was the owner of and in the possession of certain shares of stock in the Huntington Valley Stock and Land Company, a corporation, and in the Diamond Valley Livestock and Land Company, a corporation, and also was the owner of and in the possession of certain real and personal property in the State of Nevada, among which were what is known as the [35] Diamond Valley Ranch in Eureka County, Nevada, and the appurtenances; also livestock, ranch equipment and other personal property upon said ranch.

3. Said Reinhold Sadler left a will, a copy of which is made a part hereof as Exhibit "A." Said will was duly and regularly admitted to probate by the First Judicial District Court of the State of Nevada in and for the County of Ormsby in that certain proceeding entitled "In the matter of the Estate of Reinhold Sadler," docket No. 3718, in said court, and letters of administration of the estate of said decedent were duly and regularly issued to Louisa Sadler, decedent's widow, who duly qualified as administratrix. No decree of distribution was entered in said estate proceedings. During his lifetime five children were born, the issue of said Reinhold Sadler, namely: Wilhelmina Sadler Plummer, referred to as "Minnie" in said will; Edgar A. Sadler, defendant named above, referred to as "Edgar" in said will; Alfred R. Sadler, whose administratrix is named as a defendant herein, referred to as "Alfred" in said will; Bertha L. Sadler, referred to in the first codicil to said will dated June 6, 1885; and Clarence T. Sadler, plaintiff named above, referred to in the second codicil to said will dated June 12, 1891.

4. Said Wilhelmina Sadler Plummer died on September 5, 1903, being then a resident of Carson City, Nevada. Said Bertha L. Sadler died, a single woman without issue, on April 29, 1921, being then a resident of Carson City, Nevada. Plaintiff is informed and believes that said Bertha L. Sadler died intestate and that no proceedings have been instituted for the administration or distribution of her

estate. Said Louisa Sadler died on August 6, 1923, being then a resident [36] of Grass Valley, California, leaving her surviving as heirs at law and next of kin three sons, said Edgar A. Sadler, said Alfred R. Sadler and said Clarence T. Sadler, and one grandson, namely, Edgar L. Plummer, the only child of said Wilhelmina Sadler Plummer, deceased. Plaintiff is informed and believes that said Louisa Sadler died intestate and that no proceedings have been instituted for the administration or distribution of her estate. Said Alfred R. Sadler died on March 5, 1944. On March 27, 1944, letters of administration upon the estate of Alfred R. Sadler were duly and regularly issued to Kathryn Powers Sadler, defendant named above, by the Second Judicial District Court of the State of Nevada in and for the County of Washoe, and ever since said date said Kathryn Powers Sadler has been, and still and now is, the duly appointed, qualified and acting administratrix of the estate of said Alfred R. Sadler, deceased.

5. On or about December 31, 1915, a complaint was filed in the District Court of the Fourth Judicial District of the State of Nevada, in and for the County of Elko, by Huntington and Diamond Valley Stock and Land Company, a corporation, against the Huntington Valley Stock and Land Company, a corporation, the Diamond Valley Livestock Company, a corporation, Louisa Sadler, administratrix of the estate of Reinhold Sadler, deceased; Louisa Sadler, Edgar A. Sadler, Bertha L. Sadler, Alfred R. Sadler, Clarence T. Sadler and

others to quiet title to certain lands and the appurtenances, in Eureka County, Nevada, known as the Diamond Valley Ranch. A copy of the said complaint is made a part hereof as Exhibit B.

6. On or about February 14, 1918, a stipulation was entered into between plaintiff and defendants in said action [37] whereby it was stipulated that the legal title to the said lands and property be transferred to Edgar A. Sadler and Alfred R. Sadler upon the payment of \$15,000.00 to plaintiff in said action. A copy of the said stipulation is made a part hereof as Exhibit C. Said stipulation was made and entered into by Louisa Sadler, Edgar A. Sadler, Alfred R. Sadler, Bertha L. Sadler and Clarence T. Sadler in consideration of an agreement between them that said Edgar A. Sadler and Alfred R. Sadler would acquire and hold the legal title to said real property, and would take and hold title to and possession of the livestock, ranch equipment and other personal property situated thereon, in trust for the heirs of Reinhold Sadler, deceased, as named in the terms and provisions of his said will. Thereafter a written memorandum of said trust agreement was executed by said Edgar A. Sadler and Alfred R. Sadler as hereinafter alleged.

7. On the date that said judgment and decree was made and entered, namely on or about March 2, 1918, Herman J. Sadler, as attorney in fact for the Huntington and Diamond Valley Stock and Land Company, a corporation, transferred and conveyed the said property and appurtenances to defendant

Edgar A. Sadler and to Alfred R. Sadler. Thereafter and on or about March 12, 1918, the Huntington and Diamond Valley Stock and Land Company duly transferred and conveyed the said real property and appurtenances to said defendant, Edgar A. Sadler and Alfred R. Sadler, and the president of said company also conveyed the same to defendant Edgar A. Sadler and to Alfred R. Sadler by deed recorded in the office of the county recorder of Eureka County, Nevada, on March 23, 1918, a true and correct copy of which is made a part hereof as Exhibit I.

6. On or about March 2, 1918, and on the same date [38] that the said judgment and decree was made and entered in the said action defendant Edgar A. Sadler and Alfred R. Sadler mortgaged the said property and appurtenances to the Washoe County Bank, Reno, Nevada, for the sum of \$16,500.00, of which the sum of \$1500.00 was paid to the attorneys for defendants and the balance of \$15,000.00 was paid to plaintiff in accordance with the terms and provisions of the said stipulation, Exhibit C.

9. On March 2, 1918, that being the date on which the said decree and on which the said deed was given by Hermann J. Sadler, attorney in fact for the Huntington and Diamond Valley Stock Company conveying the said Diamond Valley Ranch to defendant Edgar A. Sadler and to Alfred R. Sadler, and the date on which the said mortgage was given to the said Washoe County Bank for the said sum

of \$16,500.00, as aforesaid, defendant Edgar A. Sadler and Alfred R. Sadler duly made and entered into a written memorandum of their aforesaid agreement to hold in trust for the heirs of said Reinhold Sadler, deceased, the said real property and appurtenances known as the Diamond Valley Ranch and also all livestock and other personal property upon said property. A true and correct copy of said memorandum is made a part hereof as Exhibit L.

10. Kathryn Powers Sadler, administratrix of the estate of Alfred R. Sadler, deceased, admits that she, under the said agreement, Exhibit L, holds the said Diamond Valley Ranch and the appurtenances, livestock and other personal property in trust as provided in said agreement, Exhibit L. But the defendant, Edgar A. Sadler, since the death of Alfred R. Sadler, on or about March 5, 1944, has repudiated the trust and refuses and neglects to do anything in relation thereto and claims that [39] he is under no obligation to fulfill the promises made by him in said agreement, Exhibit L, and asserts that he holds said property free from any claim by plaintiff or by other persons similarly situated, under the terms and provisions of said agreement, Exhibit L. Said Diamond Valley Ranch and appurtenances, livestock, equipment and other personal property are now of the value of in excess of \$100,000.00; within six months last past defendant Edgar A. Sadler has refused and neglected and still and now refuses and neglects to account to or give a statement to plaintiff or to the other beneficiaries

of the said trust named in said agreement, Exhibit L, or in any way to give a statement of business transactions, receipts, or disbursements by him on account of or through the terms and provisions of said agreement, Exhibit L.

11. By virtue of the facts hereinabove alleged plaintiff is the equitable owner of an undivided twenty-nine per cent (29%) of the aforesaid Diamond Valley Ranch and appurtenances, livestock, equipment and other personal property, title to which and possession of which are held in trust by defendants named above for plaintiff, for the heirs of Alfred R. Sadler, deceased, and for Edgar A. Sadler and Edgar L. Plummer.

12. Said Edgar L. Plummer is a citizen of the State of California, residing in Auburn, California. Said Edgar L. Plummer has not been joined as a party to this action because the jurisdiction of the court entitled above over him as to service of process and venue can be acquired only by his consent or voluntary appearance.

13. References to Exhibits in this Amended Complaint are to the exhibits attached to plaintiff's original Complaint on file in the action entitled above, which are by reference incorporated herein. [40]

Wherefore, plaintiff prays judgment:

1. That the defendant, Edgar A. Sadler, account for all properties, real and personal, received by him from, on account of, or through the said agreement, Exhibit L, and that he give an account of all

his disbursements in connection with the said properties since the execution of the said agreement, Exhibit L.

2. That defendants Edgar A. Sadler and Kathryn Powers Sadler, as administratrix of the estate of Alfred R. Sadler, deceased, be decreed and determined to be trustees for the heirs of Reinhold Sadler, deceased, and their successors in interest, and that it be decreed and adjudged that said defendants hold and possess said real property and its appurtenances, and the said livestock, ranch equipment and other personal property, in trust for said beneficiaries under the terms and provisions of said memorandum of agreement, Exhibit L.

3. For such other, further and additional relief as may be meet and proper in the premises.

SPRINGMEYER &
THOMPSON.

/s/ BRUCE R. THOMPSON,
Attorneys for Plaintiff.

Service by copy admitted this 1st day of February, 1945.

H. R. COOKE,
Attorney for Defendant,
Edgar A. Sadler.

/s/ WM. KEARNEY,
Attorney for Defendant,
Kathryn Powers Sadler.

[Endorsed]: Filed Feb. 2, 1945. [41]

[Title of District Court and Cause.]

AMENDMENT TO AMENDED COMPLAINT

It Hereby Is Stipulated by and between plaintiff named above and defendant Edgar A. Sadler named above that plaintiff's Amended Complaint filed in the action entitled above be, and the same hereby is, amended by adding thereto between lines 15 and 16 on page 4 thereof the following:

“Thereafter and on or about March 2, 1918, a judgment and decree duly was entered in said action ordering that the said property be transferred to defendant Edgar A. Sadler and to Alfred R. Sadler. A copy of said decree is attached hereto as Exhibit D.”

It Further Is Stipulated that the allegations of fact made and contained in said addition to said Amended Complaint are admitted by defendant Edgar A. Sadler.

Dated: May 31, 1946.

SPRINGMEYER &
THOMPSON,

Attorneys for Plaintiff.

/s/ H. R. COOKE,

Attorney for Defendant
Edgar A. Sadler.

[Endorsed]: Filed Sept. 17, 1946. [42]

[Title of District Court and Cause.]

SEPARATE APPEARANCE AND NOTICE OF
MOTION BY DEFENDANT EDGAR A.
SADLER TO DISMISS PLAINTIFF'S
AMENDED COMPLAINT

Without prejudice to and reserving all and singular the objections made by this defendant to plaintiff's original Complaint, and to defendant's exceptions to the ruling of the Court denying defendant's Motion to Dismiss said original Complaint, the said defendant Edgar A. Sadler moves the Court as follows:

I.

To dismiss the action as to this defendant because plaintiff's Amended Complaint fails to state a claim against this defendant upon which relief can be granted. [43]

II.

Said Amended Complaint affirmatively shows this court is without jurisdiction, in that:

(a) It affirmatively appears from said Amended Complaint that the property for which decree and accounting are sought herein is the property and proceeds of property belonging to Reinhold Sadler, deceased, and that by said Amended Complaint this court is asked to give effect to the last will of said Reinhold Sadler, deceased, being Exhibit A annexed to plaintiff's original Complaint. It further appears from said Amended Complaint (Paragraph 3) that administration of the estate of said Reinhold Sad-

ler, deceased, has been commenced and is still pending in the First Judicial District Court of Nevada, in and for Ormsby County, and that no decree of distribution has been entered in said probate proceedings.

(b) That without a legal representative of said estate being brought before this court, this court cannot proceed herein for want of a necessary and indispensable party; that for aught that appears said estate was and is insolvent, the allowed claims of creditors greatly exceeding the assets; that the instant proceedings purports to in effect have this court determine not only who are the heirs of said Reinhold Sadler, deceased, but also to distribute the assets of said estate direct to such heirs, in disregard of claims, if any, to creditors of the Estate of said Reinhold Sadler, deceased; that such proceeding is within the exclusive jurisdiction of the said First Judicial District Court of the State of Nevada, in and for Ormsby County in which said probate proceeding is pending.

(c) It appears from said Amended Complaint that Louisa Sadler, surviving wife of Reinhold Sadler, under his will, [44] Exhibit A, was entitled to one-third of all property of said Reinhold Sadler, and that in the event the "homestead" mentioned in said will was sold, said Louisa Sadler was entitled to one-half of the proceeds thereof. It further appears that said Louisa Sadler died intestate (Amended Complaint, Par. 4), but that no proceed-

ings for administration of her estate have been instituted; that by the terms of said will, at least one-third of the property for which accounting and decree are sought herein belongs to the Estate of the said Louisa Sadler, deceased; that no accounting or decree can be made herein as to the heirs of the estate of Louisa Sadler, deceased, until her lawful heirs have been determined and said estate found to be solvent, for which reasons her legal representative is a necessary and indispensable party to this action.

(d) It affirmatively appears from said Amended Complaint (Par. 11 thereof) that Edgar L. Plummer is the owner of an undivided 23/100ths of the alleged trust property referred to in said action; that (Amended Complaint Par. 10) said interest is of the approximate value of \$23,000.00; that the premises considered, said Edgar L. Plummer is a necessary and indispensable party to this action, to the end and for the reason, among others, that this court may have jurisdiction, and also that defendant be not compelled to respond to two or more suits for essentially the one cause of action.

On the hearing hereon, said defendant will use and refer to the files, records and proceedings herein, and to this Notice of Motion.

Dated: February 17, 1945.

H. R. COOKE,

Attorney for Defendant, Edgar A. Sadler, First
National Bank Bldg., Reno. [45]

To: Messrs. Springmeyer & Thompson,
Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above Motion on for hearing before said Court on March 5, 1945, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard.

H. R. COOKE,
Attorney for Defendant,
Edgar A. Sadler.

Service, by copy, of the above and foregoing Motion is hereby admitted this 19th day of February, 1945.

SPRINGMEYER &
THOMPSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 19, 1945. [46]

In the District Court of the United States of
America in and for the District of Nevada

No. 371

CLARENCE T. SADLER,

Plaintiff,

vs.

EDGARD A. SADLER and KATHRYN POW-
ERS SADLER, as Administratrix of the Es-
tate of ALFRED R. SADLER, Deceased,

Defendants.

DECISION—SEPARATE APPEARANCE AND
NOTICE OF MOTION BY DEFENDANT,
EDGAR A. SADLER, TO DISMISS PLAIN-
TIF'S AMENDED COMPLAINT

The motion of Attorney for Defendant, Edgar A. Sadler, to dismiss the action as to said Defendant, having been finally submitted upon briefs filed, and the Court being fully advised in the premises,

It Is Ordered that said motion to dismiss the action as to said Defendant, Edgar A. Sadler, be, and the same hereby is, denied.

It Is Further Ordered that said Defendant have fifteen days from date hereof to file his Answer.

Dated: This 17th day of October, 1945.

ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed Oct. 18, 1945. [47]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT EDGAR A. SADLER TO PLAINTIFF'S AMENDED COMPLAINT

Comes Now the above named defendant, Edgar A. Sadler, and for his separate answer to plaintiff's Amended Complaint herein, said defendant Edgar A. Sadler admits, denies and alleges:

I.

Answering the allegations of paragraph I of said Amended Complaint, said defendant admits the same.

II.

Answering the allegations of paragraph 2 of said Amended Complaint, said defendant admits the same. [48]

II.

Answering the allegations of Paragraph 2 of said Amended Complaint, said defendant denies that at the time of his death on January 29, 1906, the said Reinhold Sadler was the owner of the shares of stock mentioned or referred to in said Paragraph 2, and denies that said deceased at said time was the owner of the real or personal property mentioned or referred to in said paragraph.

This amendment is in accordance with the order of court dated Sept. 17, 1946.

/s/ AMOS C. DICKEY,

Clerk.

By /s/ O. F. PRATT,

Deputy.

III.

Answering the allegations of paragraph 3 of said Amended Complaint, said defendant admits the same.

IV.

Answering the allegations of paragraph 4 of said Amended Complaint, said defendant avers he is without knowledge or information sufficient to form a belief as to the truth of the averment that at the time of her death to wit, on August 6, 1923, said Louisa Sadler was then a resident of Grass Valley, California; also, as to the averment that Louisa Sadler died intestate and that no proceedings have been instituted for the administration or distribution of her estate; admits the remaining allegations of said paragraph 4.

V.

Answering the allegations of paragraph 5 of said Amended Complaint, said defendant admits the same.

VI.

Answering the allegations of paragraph 6 of said Amended Complaint, said defendant admits the making of the Stipulation of February 14, 1918; denies that thereby it was stipulated that the legal title only, be transferred; denies that said Stipulation was made or entered into by Louisa Sadler, Edgar A. Sadler, Alfred R. Sadler, Bertha L. Sadler and Clarence T. Sadler, or by any of them, in

consideration of the alleged or any agreement between them that said Edgar A. Sadler and Alfred R. Sadler would acquire and hold the legal title to said or any property and/or would take and hold title to and/or possession of the livestock, ranch, equipment and/or other personal property situate thereon in trust for the heirs of Reinhold Sadler, deceased, as named in the terms and provisions of his said Will; denies that thereafter or at all [49] a written memorandum of said alleged trust agreement was executed by said Edgar A. Sadler as alleged, or at all; admits the remaining allegations of said paragraph 6.

VII.

Answering the allegations of paragraph 7 of said Amended Complaint, said defendant admits the same.

VIII.

Answering the allegations of paragraph 8 (erroneously designated "6") of said Amended Complaint, said defendant, Edgar A. Sadler, admits the same.

IX.

Answering the allegations of paragraph 9 of said Amended Complaint, said defendant, Edgar A. Sadler denies all and singular the allegations of said paragraph 9.

X.

Answering the allegations of paragraph 10 of said

Amended Complaint, said defendant, Edgar A. Sadler, avers he is without knowledge or information sufficient to form a belief as to the truth of the averment that Kathryn Powers, administratrix of the estate of Alfred R. Sadler, deceased, admits that he, under said alleged agreement Exhibit L holds all alleged or any property in trust as provided in said Exhibit L or otherwise or at all. Said defendant, Edgar A. Sadler, admits that he has refused and continues to refuse to do anything in relation to said alleged trust; admits that he claims he is under no obligation to fulfill the promises alleged to have been made by him in said alleged agreement Exhibit L; admits that he asserts that he holds said property free from any claim of plaintiff, or by other persons similarly situated, under the terms of said alleged agreement Exhibit L; denies that the said Diamond Valley Ranch and appurtenances, [50] livestock, equipment and other personal property are now of a value in excess of \$100,000, or of any value in excess of \$25,000, or thereabouts; admits that this defendant has refused and now refuses to account or to give a statement of the business, receipts and disbursements, to plaintiff or to the other alleged beneficiaries of the alleged trust agreement Exhibit L.

XI.

Answering the allegations of paragraph 11 of said Amended Complaint, this defendant denies that by virtue of the facts alleged, or by virtue of any matter or thing whatsoever, the said plaintiff

is the equitable owner, or owner at all, of an undivided 29%, or any per cent, of the property or any thereof, mentioned in said paragraph 11 of the Amended Complaint; denies title or possession of the property referred to are held in trust by this defendant as a trustee with said Alfred R. Sadler, or at all, for plaintiff or for the heirs of Alfred R. Sadler, deceased, or for Edgar A. Sadler and/or Edgar L. Plummer or any of them.

XII.

Answering the allegations of paragraph 12 of said Amended Complaint, this defendant admits that said Edgar L. Plummer at the time of the commencement of this action was a citizen of the State of California, residing in Auburn in said state; that as to the remaining allegations of said paragraph 12 this defendant avers he is without knowledge or information sufficient to form a belief as to the truth thereof.

XIII.

Answering the allegations of paragraph 13 of said Amended Complaint, this defendant admits the same. [51]

For a first affirmative defense to plaintiff's Amended Complaint and cause of action, said defendant, Edgar A. Sadler, alleges:

I.

The said plaintiff should not be permitted to have or maintain his alleged cause of action herein for

that four years and more prior to the commencement of this action, this defendant denied, disclaimed and repudiated to said plaintiff the alleged trust and trust relationship set forth in said amended Complaint including any trust or trust relationship of any kind or character whatsoever involving or affecting the property described or referred to in said Complaint, or any part thereof; that said denial, disclaimer and repudiation was made to said plaintiff by this defendant about the year 1924 or 1925 and also about November 1938, as well as at divers other times both before and subsequent to said last mentioned time; that the substance and effect thereof were that said plaintiff had no interest whatever, by trust or otherwise, in said property or any thereof.

II.

In virtue of the facts above stated, said defendant alleges that plaintiff's cause of action, if any he ever had, is barred by the provisions of the statute of limitations of the State of Nevada and particularly Nevada Comp. Laws 1929 N.C.L. Sec. 8527 and subsection 4 of the "within three years" clause of Sec. 8524.



For a second affirmative defense to plaintiff's amended Complaint and cause of action, said defendant, Edgar A. Sadler alleges: [52]

I.

That said plaintiff should not be permitted to have or maintain his alleged cause of action herein

for in that any and all rights, claims, demands or causes of action if any, which plaintiff may at any time have had in respect of the property described in said Amended Complaint, are barred by the laches of plaintiff in failing to seasonably assert his alleged rights and to commence his action in support of which said defendant avers and shows to the Court the following:

(a) That shortly following March 2, 1918, this defendant became personally liable for the sum of \$16,500, necessary for use in purchasing the real property described in the Complaint and for discharging certain indebtedness against said ranch land and that to secure the payment of said \$16,500 this defendant in addition to other property, mortgaged 200 head of cattle, the personal property of this defendant; that thereafter, all of said indebtedness was subsequently paid by this defendant in large part, if not wholly, from moneys acquired by this defendant from one or more life insurance policies taken out by defendant upon his life and substantially paid for by him prior to March 2, 1918.

(b) That on March 2, 1918, the number of cattle carrying the  Reinhold Sadler or "ranch brand," on or pertaining to the ranch described in said Amended Complaint did not exceed 50 head and this defendant is informed and believes and he so alleges, the actual number was about 20 head; and at said time this defendant had 200 head more or less of cattle carrying the  interlocking quarter circle Edgar A. Sadler brand [53] said cattle

being then and there the property of this defendant; that said **K** cattle then and thereafter ranged with said cattle belonging to this defendant and the same with its progeny were run in the same manner as said **S** cattle, the progeny being branded **S** .

(c) That on or about the year 1930, Ethel Sadler, the wife of this defendant having inherited \$2,000, from her mother's estate, invested the same in the purchase of about 40 or 50 head of cows and calves which were thereupon placed on said ranch and run with the aforesaid cattle, or the progeny thereof and branded with the same brand, to wit, **S** and so continued from thence hitherto. At about the same time this defendenat mortgaged his said individually owned cattle and with the proceeds, or a portion thereof bought about 50 cows and calves.

(d) That prior to the year 1930 Reinhold Sadler, an adult son of this defendant, acquired and separately owned about 40 or 50 head of cows and calves, and in said year he acquired and became the separate owner of 50 cows and calves, all of the aforesaid cattle being branded **E** , the registered brand of said Reinhold Sadler; that thereupon and without said Reinhold Sadler having, as this defendant is informed and believes and so alleges, any knowledge or notice of the alleged claims of the plaintiff, said **E** cattle were pursuant to agreement between this defendant and said Reinhold Sadler, run together with the **S** and **K** cattle, the proceeds and profits were pooled and reinvested. [54]

(e) That between 1933 and 1937, from time to time, the said Reinhold Sadler under the same conditions above stated, put into the said ranch and cattle business the additional sum of \$3,000 most, if not all of which, was used in construction of a dwelling on said ranch property. That Ruth Sadler, wife of said Reinhold Sadler, in like manner put \$5,000, moneys personally earned by her as a school teacher, into said ranch and cattle business for the purpose of being used and which were actually used in betterment of said property.

(f) That in 1937 Floyd Sadler, an adult son of this defendant, pursuant to an agreement with this defendant and the said Reinhold Sadler, and, as defendant is informed and believes and so alleges, without any notice or knowledge of the alleged claims of plaintiff, put 42 head of cattle into said ranch and cattle business, for which he obtained a one-fifth interest, which was later increased to an undivided one-third interest in the whole of said business; that the cattle so put in were branded **5**, the registered brand of said Floyd Sadler; that thereafter the said Floyd Sadler put in about \$2,000 cash to help keep said ranch and business going; that from 1937 to 1940 said Floyd received no share of the profits or proceeds for the interest owned by him to have amounted to about \$1,500 per year.

(g) That long prior to March 2, 1918 this defendant had obtained three life insurance policies: one issued by New York Life Insurance Co., for \$3,000,—cashed by this defendant in 1920; one policy

by Kansas City Life Insurance Co. for \$1,800, or over—cashed by this defendant in 1922; one policy [55] issued by New York Life Insurance Co. for \$3,000, and cashed by this defendant in 1933; that the dwelling house on said ranch burned down in 1922 and a new dwelling house was built, as defendant verily believes and so avers, with the proceeds of the \$1,800 policy above mentioned; that the remainder of said moneys, the proceeds of the insurance policies aforesaid, was expended in the general operation and upkeep of said ranch and cattle business.

(h) That in the year 1929 this defendant secured with his own funds for his own use in said work and business, a lease on the so-called Eccles Ranch with buildings thereon, said property being of the value of about \$8,000; that the annual rental was and is \$400 per year; that said leased property produced about 200 tons of hay per year and contains valuable water rights usable and used in connection with the so-called home ranch, described in plaintiff's Amended Complaint; that divers buildings on said leased land have been torn down, but under the terms of said lease, must be replaced at the end of said lease.

(i) That the total number of cattle on said ranch at the time of this action was commenced, was 650 head owned, and claimed, an individual one-third by this defendant and his wife, Ethel Sadler, an undivided one-third by the said Reinhold Sadler and his said wife; and the remaining undivided one-third by the said Floyd Sadler; that in 1918 the

total value of said ranch and the 20 to 50 head of *H* cattle then being thereon, was about \$16,000; that since March 2, 1918, by the work and labor of this defendant and his partners, the said [56] Reinhold and Floyd Sadler and between 1927 and 1939, about 50 acres of sagebrush ground have been brought into cultivation, plowed and put into clover and alfalfa.

(j) On said ranch at the time of the commencement of this action, was a quantity of new and valuable farm machinery viz. a truck, tractor, drill, power machine costing about \$4,000; other machinery worth from \$1,000 to \$1,500; also mowing machines, disc harrows and the like, all of the above being purchased with moneys the proceeds of cattle sold from time to time, the property as aforesaid of this defendant, the said Ethel, Reinhold, Ruth and Floyd Sadler.

(k) That at divers time since March 2, 1918, and prior to the commencement of this suit, in order to raise needed money to carry on as well as to buy more cattle, this defendant singly, and also with his said co-partners later, mortgaged all of the livestock at the time on said ranch; that it is now in effect impossible to determine what portion if any of the cattle so acquired belonged to plaintiff and what portion belonged to this defendant, and what portion belongs to the said Reinhold, Floyd, Ethel and Ruth Sadler.

(l) That at various times since 1918 this defendant and his said co-partners, Reinhold and Floyd Sadler, have drawn from proceeds of said

business as profits thereof, sums of money aggregating many thousands of dollars; that no records or books of account were kept by defendant on the said co-partnership as to credits or debits inter sese and on account of the lapse of time and defendant being lulled into a sense of security, the [57] defendant avers it is impossible to determine equitably what portion if any, of said property belongs to plaintiff and what portion belongs to defendant and his said co-partners; that no accounting was ever made by this defendant nor was any accounting as such ever demanded by plaintiff except by the commencement of this action; that plaintiff had notice and knowledge at the time of all and singular the matters hereinbefore alleged.

(m) That of the beneficiaries of the trust alleged by plaintiff, the following have died since March 2, 1918, viz, Mrs. Louisa Sadler died August 6, 1923, without administration on her estate; Bertha L. Sadler died April 29, 1921, without administration on her estate; Alfred R. Sadler died March 5, 1944.

(n) That on or about March 5, 1944, the said Alfred R. Sadler died at Reno, Nevada; that plaintiff commenced this action on September 16, 1944; that had this action been timely commenced, this defendant could and would have had the benefit of the testimony of the said Alfred R. Sadler; that if said Alfred R. Sadler were alive he could and would testify to the substance and effect that since March 2, 1918, the plaintiff never had anything to

do with the ranch and cattle and no interest therein; that he, Alfred R. Sadler, had a "moral" interest in the real property which he offered to sell to this defendant for \$3,000, but claimed no interest in the livestock or other personal property on said ranch; that as this defendant is informed and believes and so charges the fact to be, plaintiff was, prior to the death of said Alfred R. Sadler, [58] informed of the fact that said Alfred R. Sadler could and would so testify; that there is no person available to the knowledge of this defendant who can give the same or similar testimony.

For a third affirmative defense to plaintiff's Amended Complaint and cause of action, said defendant, Edgar A. Sadler alleges:

I.

That the estate of Louisa Sadler, deceased, one of the beneficiaries of the alleged trust by its legal representative, the estate of Bertha Sadler, deceased, one of the beneficiaries of said alleged trust by its legal representative, the estate of Wilhelmina Sadler, deceased, one of the beneficiaries of said alleged trust by its legal representative, should be made parties to the suit; that if the plaintiff ever had or now has a cause of action against this defendant in respect of the matters alleged in his Amended Complaint, then this defendant avers that the heirs of each of said deceased have a joint and non-severable interest in the cause of action asserted by plaintiff and the legal representative of said

estates are indispensable parties; that complete relief cannot be accorded between those already parties without the joinder of the absent persons above referred to; that no accounting or judgment made herein between the parties now before the court, would be binding upon the absent persons or any of them, in consequence whereof this defendant might be subjected to three or more further actions, all including the instant suit, involving essentially but one subject matter and one cause of action. [59]

For a fourth affirmative defense to plaintiff's Amended Complaint and cause of action, said defendant, Edgar A. Sadler alleges:

I.

That if said alleged agreement of March 2, 1918, Exhibit L, annexed to plaintiff's Amended Complaint and the alleged agreement set forth in paragraph 6 of said Amended Complaint page 4, lines 7-13 were, or either of them was, executed on the part of this defendant, the same at all times have been and now are and each of them is null and void as to this defendant for in that said alleged agreements were and each of them was and so remain without any consideration.

For a fifth affirmative defense to plaintiff's Amended Complaint and cause of action, said defendant, Edgar A. Sadler alleges:

I.

That if the alleged agreement set forth in plain-

tiff's Amended Complaint paragraph 6, page 4, lines 7-13 was ever made, the same nor any part thereof, was not in writing, subscribed by this defendant or by any of the alleged parties thereto, or by his or their lawful agent thereunto authorized in writing, and the same was and is null and void in virtue of the provisions of the Statute of Frauds of the State of Nevada, N.C.L., Sec. 1527.

For a sixth affirmative defense to plaintiff's Amended Complaint and cause of action, said defendant, Edgar A. Sadler alleges: [60]

I.

That if the said alleged agreement of March 2, 1918, being Exhibit L annexed to plaintiff's Complaint and the alleged agreement of February 14, 1918, as set forth in plaintiff's Amended Complaint, paragraph 4, section 6, lines 7-13, or either of them, were ever made, the same are and each of them is null and void because violative of the Rule against Perpetuities in that under neither of said alleged agreements must any estate vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the alleged interest and that said alleged agreements are and each of them is void for remoteness.

Wherefore this defendant prays that plaintiff take nothing by his said Amended Complaint and

action herein; that the same may be dismissed and that this defendant may go hence with his costs.

H. R. COOKE,
Attorney for Defendant
Edgar A. Sadler.

Service of foregoing separate Answer of defendant Edgar A. Sadler, by copy, admitted this 16th day of November, 1945, and within the time as extended therefore by oral stipulation.

Dated: November 16, 1945.

SPRINGMEYER &
THOMPSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 17, 1945. [61]

[Title of District Court and Cause.]

NOTICE OF MOTION BY DEFENDANT
EDGAR A. SADLER TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND,
SUBJECT THERETO, FOR SUMMARY
JUDGMENT

To: Plaintiff above named, and
Messrs. Springmeyer & Thompson,
His attorneys:

Take Notice that on the day and hour specified in the hereunto annexed order of the Court, in the above-entitled Court in the Court Room thereof in

the U. S. Post Office Building, at Reno, Nevada, the said defendant will move said court for an order or orders as follows:

I.

That plaintiff's Amended Complaint herein be dismissed, for in that: [62]

(a) Lack of jurisdiction by the court over the subject matter;

(b) Failure of plaintiff's Amended Complaint to state a claim upon which relief can be granted.

II.

Subject to the foregoing, said defendant will move the said court at the same time and place, for a summary judgment, upon the ground that it affirmatively appears from said plaintiff's Amended Complaint that plaintiff is entitled to no relief and that said defendant is entitled to summary judgment that the action as to him be dismissed with prejudice.

On the hearing hereon said defendant will use and refer to plaintiff's Amended Complaint and to the Exhibits annexed to plaintiff's original Complaint and referred to in said Amended Complaint, and to such other documents or affidavits as may be presented to the court on said hearing.

Dated: July 15, 1946.

H. R. COOKE,
JOHN D. FURRH, JR.,
Attorneys for Defenedant.

On application of defendant Edgar A. Sadler,

It Is Ordered that the time of hearing the foregoing Motion is hereby set for Sept. 11th, 1946, at the hour of 2 o'clock p.m., at the Court Room of the U. S. District Court, U. S. Post Office Building, Reno, Nevada; and it is

Further Ordered that a copy of the foregoing be served upon plaintiff at least 30 days before said hearing date.

Dated: July 15, 1946.

ROGER T. FOLEY,
District Judge.

Service, by copy, of the foregoing Notice of Motion, with Order attached, admitted this 1st day of Aug., 1946.

SPRINGMEYER &
THOMPSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1946. [64]

[Title of District Court and Cause.]

MINUTES OF COURT, SEPTEMBER 17, 1946

This being the time heretofore fixed for the hearing on Motion for Order permitting the defendant Edgar A. Sadler to amend his Answer; and Motion of defendant Edgar A. Sadler to dismiss Amended Complaint, and subject thereto, for a Summary Judgment, and the same coming on regularly this day, Bruce R. Thompson, Esq., appears for and on behalf of the plaintiff, and Messrs. H. R. Cooke and John D. Furrh, Jr., appears for the defendant Edgar A. Sadler. The Motion to Amend Answer is taken up first. Mr. Cooke offers in evidence, in connection with the Motion to Amend Answer, a certified copy of a deed, dated May 25, 1885, between Reinhold Sadler and Louisa Sadler, his wife, and Diamond Valley Live Stock and Land Company, which is admitted and marked Defendant's Exhibit No. 1. Following arguments by counsel for the respective parties, the Motion is submitted. Thereupon It Is Ordered that the Motion to Amend Answer of defendant Edgar A. Sadler be, and the same hereby is, granted. The Motion to Dismiss Amended Complaint, and subject thereto, for a Summary Judgment is next taken up. Mr. Cooke waives his Motion for a Summary Judgment and argues on the Motion to Dismiss. Mr. Thompson replies and the Motion is submitted. Thereupon It Is Ordered that the Motion to Dismiss be, and the same hereby is, denied. [65]

In the District Court of the United States of
America, in and for the District of Nevada

No. 371

CLARENCE T. SADLER,

Plaintiff,

vs.

EDGAR A. SADLER and KATHRYN POWERS
SADLER, as Administratrix of the Estate of
Alfred R. Sadler, deceased,

Defendants.

OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Kathryn Powers Sadler, as Administratrix of the Estate of Alfred R. Sadler, deceased, was dismissed as a party to this action pursuant to the suggestion made in the Decision of March 29, 1946, on the Motion of defendant Edgar A. Sadler to realign parties.

The real property with which we are concerned in this action has been referred to by the parties as the Diamond Valley Ranch.

The connection of plaintiff Clarence T. Sadler and Edgar A. Sadler with the title to Diamond Valley Ranch springs from their relation as heirs of Reinhold Sadler, deceased. Defendant Edgar A. Sadler and his deceased brother, Alfred R. Sadler, acquired legal title to Diamond Valley Ranch by

[Title of District Court and Cause.]

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In the District Court of the United States of
America, in and for the District of Nevada

No. 371

CLARENCE T. SADLER,

Plaintiff,

vs.

EDGAR A. SADLER and KATHRYN POWERS
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Defendants.

OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

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The connection of plaintiff Clarence T. Sadler and Edgar A. Sadler with the title to Diamond Valley Ranch springs from their relation as heirs of Reinhold Sadler, deceased. Defendant Edgar A. Sadler and his deceased brother, Alfred R. Sadler, acquired legal title to Diamond Valley Ranch by

virtue, as counsel for plaintiff points out, of the cumulation on March 2, 1918, of a series of events. On February 14, 1918, the parties to the quiet title action referred to in the complaint [147] entered into a stipulation providing among other things that judgment may be entered in the said action as follows:

“1. That it be adjudged and decree that the defendants, Edgar Sadler and Alfred Sadler are the owners and entitled to the possession of all the property described in plaintiff’s complaint, which is situate in the County of Eureka, State of Nevada, and known as the Diamond Valley Ranch, a more particular description of said property to be inserted in said decree, their title thereto quieted, and that none of the other parties to this action have any right, title or estate in said property, or any part thereof.

* * * * *

“4. That the money to be paid by the said Edgar Sadler and Alfred Sadler to the plaintiff as a consideration for this settlement and decree, shall be solely the obligation of said Edgar Sadler and Alfred Sadler, and that none of the parties hereto shall be in any wise personally liable therefor.

* * * * *

“6. That judgment be entered in accordance with this stipulation, and that our attorneys in said action and said Edgar Sadler and said

Alfred Sadler are authorized to take such proceedings and execute any and all papers necessary and proper to carry this stipulation into full force and effect.”

It will be noted that said stipulation was executed by the following defendants in said quiet title action: Clarence T. Sadler by Alfred R. Sadler, his attorney-in-fact; Louisa Sadler, as Administratrix of the Estate of Reinhold Sadler, deceased; Louisa Sadler; Bertha L. Sadler; Edgar Sadler; and Alfred R. Sadler. This stipulation was filed in said quiet title action March 2, 1918.

On March 2, 1918, a decree in said quiet title action was duly given and made pursuant to and in accordance with the above stipulation, the said decree among other things providing:

“It is further ordered, adjudged and decreed that defendants, Edgar Sadler and Alfred Sadler have judgment quieting title to the hereinafter described property, and that all adverse claims of the plaintiff, and all persons claiming or to claim said premises or any part thereof; through or under said plaintiff, are hereby adjudged and decreed to be invalid and groundless, and that said defendants Edgar Sadler and Alfred Sadler be and they are hereby declared and adjudged to be the true and lawful owners of the land that is hereinafter described in this paragraph and every part and parcel thereof, and that their title thereto is adjudged

to be quieted against all claims, demands, or pretensions of plaintiff, who is hereby perpetually stopped from setting up any claims thereto, or any part thereof. Said premises are bounded and described as follows, to-wit: (Description.) (Then the following language appears in the decree:)

“Containing approximately three thousand one hundred twenty (3120) acres, and constituting what is commonly known as the Diamond Valley Ranch. * * *” [148]

On March 2, 1918, Hermann J. Sadler, as attorney-in-fact for the Huntington and Diamond Valley Stock and Land Company, plaintiff in said quiet title action, by deed conveyed the Diamond Valley Ranch to Edgar and Alfred Sadler. On March 2, 1918, Alfred and Edgar Sadler executed a mortgage on the Diamond Valley Ranch to the Washoe County Bank as security for a loan of \$16,500.00. On March 2, 1918, Alfred Sadler and Edgar Sadler executed a chattel mortgage on 250 head of cattle then on said ranch to the Washoe County Bank as additional security for the same loan of \$16,500.00. The said sum of \$16,500.00 so borrowed was disbursed as follows: \$15,000.00 to the Huntington and Diamond Valley Stock and Land Company and \$1500.00 to pay the fees of defendants' attorneys in the quiet title action. On the same day, March 2, 1918,

defendant Edgar Sadler and his brother Alfred Sadler made and signed the following document:

A Agreement

Dated March 2, 1918

Reno, Nevada, and Carson City, Nevada

“This agreement is made between the following persons as follows:

“Edgar Sadler of Eureka Co. Nevada

“Alfred Sadler of Washoe Co. Nevada

“Bertha Sadler of Ormsby Co. Nevada

“Mrs. Louise (Louisa) Sadler of Ormsby Co. Nevada

“Clarence Sadler of Washington, D. C. By Alfred R. Sadler thru the Power of Attorney.

“That as soon as possible the mortgage on the Diamond Ranch in Diamond Valley, Eureka County, Nevada be lifted the lawyers fees paid and that the first good chance for the best price possible this aforesaid ranch or property be sold and then that the remainder of the money be divided according to the last will and Testament of Reinhold Sadler, deceased——

“Mother desired fifty dollars each month that is by the 10th of each month.

“A settlement of the ranch cattle with the same terms of the will.

EDGAR SADLER,
ALFRED SADLER.”

The will referred to was obviously the last will and testament of Reinhold Sadler, deceased, annexed as an exhibit to the original complaint herein. Exhibit 8 demonstrates that by [149] reason of the transactions of March 2, 1918, Alfred R. Sadler and Edgar A. Sadler did not acquire both the legal and equitable title to Diamond Valley Ranch; they did not become the absolute owners thereof. The above agreement is a declaration of trust. *Sime v. Howard*, 4 Nev. 473; *Baker v. Baker*, 31 Pac. 354 (Cal.).

The events of March 2, 1918, the stipulation, the decree, the deed and the agreement, Exhibit 8, did not just happen. They resulted from an understanding and agreement between Edgar Sadler, Alfred Sadler, Bertha Sadler and Mrs. Louisa Sadler, and the purpose of such events and instruments and agreements is declared and shown from the document called "A Agreement" of March 2, 1918, Exhibit 8. Edgar Sadler and Alfred Sadler acquired the legal title to Diamond Valley Ranch in trust for themselves and for those entitled to take as heirs under the will of Reinhold Sadler, deceased. By virtue of the transactions, events and instruments of March 2, 1918, Edgar A. Sadler and Alfred R. Sadler became co-trustees of an express trust. 65 C. J. 262, Sec. 42. "A cestui que trust of an express trust has no right of action until the trust is denied or some act is done by the trustee inconsistent with the trust; and until then the statute of limitations does not begin to run." *White v. Sheldon*, 4 Nev. 280. Here we find that there

was no open and unequivocal breach or repudiation of the trust to the knowledge of the beneficiary until March 5, 1944, after the death of Alfred Sadler.

Counsel for defendant, p. 49 of their Brief, claim that the alleged "Trust Agreement" of March 2, 1918, offends the rule against perpetuities. The contention is rejected. In *re Heberle's Estate*, 102 Pac. 935 (Cal.).

The Court may grant plaintiff any relief consistent with the case made by the Complaint and Answer and embraced within the issue. Sec. 8797, Nevada Compiled Laws. The prayer of the complaint here includes a prayer for such other, further and additional relief as may be meet and proper in the premises. Upon a prayer for general relief the Court will give the relief [150] to which the plaintiff is entitled under the principles of equity. *Hammett v. Ruby Lee Minar*, 53 F. 2d 144, 145. The Court should require the enforcement of this trust. "Equity delights to do justice and not by halves."

Exhibit "L" attached to the original Complaint (Exhibit 8 in evidence) contains a peremptory power of sale and in view of the time which has elapsed since March 2, 1918, the date of the execution of Exhibit "L," six months from the date of the filing and entry of the decree made pursuant to the Findings and Conclusions of Law herein and hereafter contained, should be sufficient additional time to allow the trustee to comply with his duty

under the trust. The decree to be submitted here should contain a direction to sell the real estate within six months from the date of filing said decree. And, within said time, six months from this date, the defendant should account for the cattle on the ranch March 2, 1918, and for all properties, real and personal, received by him from, on account of, or through said Agreement, Exhibit "L"; and that he give an account of all his disbursements in connection with the said properties since the execution of said Agreement within said time. *Metsker v. Metsker*, 151 N. E. 539 (Ill.); *In re Lichtenberg's Estate*, 185 N. Y. Supp. 913. The said accounting to be made in the light of the principle, "He who seeks equity must do equity."

The Court, having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted for decision, Now Finds the Facts and States Conclusions of Law as Follows:

Findings of Fact

1. That Paragraph I of the Amended Complaint containing jurisdictional allegations is admitted by the defendant Edgar A. Sadler.

2. That Reinhold Sadler at the time of his death on January 29, 1906, was the owner of and in the possession of certain shares of stock in the Huntington Valley Stock and Land Company, a corporation. [151]

3. That Reinhold Sadler left a will, copy of which is made a part hereof as Exhibit "A" (attached to original Complaint). Said will was duly and regularly admitted to probate by the First Judicial District Court of the State of Nevada, in and for the County of Ormsby, in that certain proceeding entitled "In the Matter of the Estate of Reinhold Sadler," Docket No. 3718, in said Court, and letters of administration of the estate of said decedent were duly and regularly issued to Louisa Sadler, decedent's widow, who duly qualified as administratrix. No decree of distribution was entered in said District Court proceedings. During his lifetime five children were born, the issue of said Reinhold Sadler, namely, Wilhelmina Sadler Plummer referred to as "Minnie" in said will; Edgar A. Sadler, defendant named above, referred to as "Edgar" in said will; Alfred R. Sadler, whose administratrix is named as a defendant herein (eliminated as a party defendant by dismissal made pursuant to order of Court filed March 29, 1946, on motion for realignment of parties); Bertha L. Sadler referred to in the first codicil of said will dated June 6, 1885; and Clarence T. Sadler, plaintiff named above, referred to in the second codicil of said will dated June 12, 1891.

4. That Wilhelmina Sadler Plummer died on September 5, 1903; that Bertha L. Sadler died, a single woman without issue, on April 29, 1921, intestate, and that no proceeding have been instituted for the administration or distribution of her estate; that Louisa Sadler died August 6, 1923, leaving

surviving as heirs at law and next of kin three sons, said Edgar A. Sadler, said Alfred R. Sadler, and said Clarence T. Sadler, and one grandson, namely, Edgar L. Plummer, the only child of said Wilhelmina Sadler, deceased; that no evidence was introduced from which it may be determined whether said Louisa Sadler died intestate; that no proceedings have been instituted for the administration or distribution of the estate of Louisa Sadler, deceased; that said Alfred R. Sadler died on March 5, 1944.

5. That on or about December 31, 1915, a complaint was filed [152] in the District Court of the Fourth Judicial District of the State of Nevada at Elko, Nevada, by Huntington and Diamond Valley Stock and Land Company, a corporation, against the Huntington Valley Stock and Land Company, a corporation, the Diamond Valley Livestock and Land Company, a corporation, Louisa Sadler, Administratrix of the Estate of Reinhold Sadler, deceased, Louisa Sadler, Edgar A. Sadler, Bertha L. Sadler, Alfred R. Sadler, Clarence T. Sadler, and others, to quiet title to certain lands and the appurtenances in Eureka County, Nevada, known as the Diamond Valley Ranch. A copy of the said complaint is made a part hereof as Exhibit "B" (attached to original Complaint).

6. That on or about February 14, 1918, a stipulation was entered into between plaintiff and defendants in said action whereby it was stipulated that the legal title to the said lands and property

be transferred to Edgar A. Sadler and Alfred R. Sadler upon the payment of \$15,000.00 to plaintiff in said action. A copy of the said stipulation is made a part hereof as Exhibit "C" (attached to original Complaint).

That thereafter and on March 2, 1918, a judgment and decree was entered in said action pursuant to said stipulation whereby it was adjudged that defendant Edgar Sadler and said Alfred Sadler were the true and lawful owners of Diamond Valley Ranch.

That said stipulation was made and entered into by Louisa Sadler, Edgar A. Sadler, Alfred R. Sadler, Bertha L. Sadler, Clarence T. Sadler pursuant to an agreement between them that said Edgar A. Sadler and Alfred R. Sadler would acquire and hold the legal title to said real property, and would take and hold title to and possession of the livestock, ranch equipment and other person property situated thereon in trust for the heirs of Reinhold Sadler, deceased, as named in the terms and provisions of the said will.

7. That on March 2, 1918, Hermann J. Sadler, as attorney-in-fact for the Huntington and Diamond Valley Stock and Land Company, a corporation, transferred and conveyed the said property and [153] appurtenances to defendant Edgar A. Sadler and to Alfred R. Sadler; that thereafter and on the 12th day of March, 1918, the Huntington and Diamond Valley Stock and Land Company duly

transferred and conveyed the said real property and appurtenances to said defendant Edgar A. Sadler and Alfred R. Sadler, and the president of said company also conveyed the same to defendant Edgar A. Sadler and to Alfred R. Sadler by deed recorded in the office of the County Recorder of Eureka County, Nevada, on March 23, 1918, a true correct copy of which is attached to the original Complaint as Exhibit "I."

8. That on or about March 2, 1918, and on the same date that the said judgment and decree was made and entered in the said action quieting title, defendant Edgar A. Sadler and Alfred R. Sadler mortgaged the said Diamond Valley Ranch and appurtenances to the Washoe County Bank, Reno, Nevada, for the sum of \$16,500.00, of which the sum of \$1500.00 was paid to the attorneys for the defendants in said quiet title action and the balance, \$15,000.00, was paid to plaintiff in accordance with the terms and provisions of the stipulation (Exhibit "C" attached to original Complaint).

That on March 2, 1918, Alfred Sadler and Edgar Sadler executed a chattel mortgage on the 250 head of cattle on the Diamond Valley Ranch to the Washoe County Bank as additional security for the said loan of \$16,500.00.

9. That on March 2, 1918, that being the date on which the said decree and on which the said deed was given by Hermann J. Sadler, attorney-in-fact for the Huntington and Diamond Valley Stock and Land Company conveying the said Diamond Valley

Ranch to defendant Edgar A. Sadler and to Alfred R. Sadler, and the date on which the said mortgage was given to the said Washoe County Bank for the said sum of \$16,500.00 as aforesaid, defendant Edgar A. Sadler and Alfred R. Sadler duly made and entered into a written memorandum of their aforesaid agreement to hold in trust for the heirs of said Reinhold Sadler, deceased, the real property and appurtenances known as the Diamond Valley Ranch and also all livestock and other personal property upon said ranch (copy [154] of said memorandum attached to original Complaint as Exhibit "L").

10. That the allegations of Paragraph 10 of the Amended Complaint concerning admissions made by Kathryn Powers Sadler are not considered as matters at issue in this case for the reason that said Kathryn Powers Sadler has been dismissed as a party defendant.

That defendant Edgar A. Sadler, since the death of Alfred R. Sadler on or about March 5, 1944, has repudiated the said trust and refuses and neglects to do anything in relation thereto and claims that he is under no obligation to fulfill the promises made by him in said Agreement Exhibit "L" (Exhibit 8 in evidence), and asserts that he holds said property free from any claim by plaintiff or by any other persons similarly situated under the terms and provisions of the said Agreement Exhibit "L"; that within six months prior to September 16, 1944, the date of the filing of the original Complaint herein, defendant Edgar A. Sadler has refused and neg-

lected, and still and now refuses and neglects, to account to or give a statement to plaintiff or to the other beneficiaries of the said trust named in said Agreement Exhibit "L," or in any way to give a statement of business transactions, receipts or disbursements by him on account of or through the terms and provisions of said Agreement Exhibit "L."

11. That plaintiff is the equitable owner of an undivided 29% of the said Diamond Valley Ranch and appurtenances, livestock, equipment and other personal property and that the legal title to which and possession of which is held in trust by defendant Edgar A. Sadler for plaintiff, and for the heirs of Alfred R. Sadler, deceased, and for Edgar A. Sadler and Edgar L. Plummer.

12. That there was no denial, disclaimer or repudiation by defendant Edgar A. Sadler to plaintiff of the trust relationship alleged in plaintiff's Amended Complaint at any time prior to March 5, 1944.

That plaintiff's cause of action is not barred by Sec. 8524, Nevada Compiled Laws 1929, nor by subsection 4 of Sec. 8524, Nevada Compiled Laws, or by any other statute of limitations. [155]

13. That the rights, claims, demands or causes of action of the plaintiff as alleged in the Complaint are not barred by the laches of plaintiff in failing to seasonably assert his alleged rights and commence his action for recovery of same; that plaintiff has not been guilty of laches in the bringing and maintaining of this action.

(a) That Edgar A. Sadler and Alfred R. Sadler signed a note in the principal sum of \$16,500.00 secured by a mortgage on the real property described in the Complaint; that the portion of the \$16,500.00, if any, paid by defendant Edgar A. Sadler can only be determined by an accounting; that all the cattle, to-wit, 250 head, more or less, on the Diamond Ranch on March 2, 1918, and described in defendant's Exhibit "A" were held in trust by Alfred and Edgar A. Sadler for themselves and other heirs of Reinhold Sadler, deceased.

(b) That plaintiff has no interest in cattle or in any property belonging to Ethel Sadler, wife of defendant Edgar Sadler, or belonging to Floyd and Reinhold Sadler, sons of Edgar Sadler; that the quantity and volume of the cattle and property of the wife and sons of Edgar Sadler cannot be determined in advance of an accounting by Edgar Sadler of trust property.

Conclusions of Law

From the foregoing facts the Court decides:

1. That defendant Edgar A. Sadler holds and possesses the aforesaid Diamond Valley Ranch, mentioned and described in the Amended Complaint and, Exhibits attached to the original Complaint, and appurtenances, livestock, equipment and other personal property upon said ranch March 2, 1918, and the increase and proceeds thereof, in trust for plaintiff Clarence Sadler, the heirs of Alfred R. Sadler, deceased, Edgar L. Plummer and for defendant Edgar A. Sadler, in the amount and

shares to which each of the above named individuals may be entitled by the terms of the last will and testament of Reinhold Sadler, deceased, and the Statutes of Descent of the State of Nevada. [156]

2. That within six months from the date of the filing and entry of the decree made pursuant to these Findings and Conclusions of Law herein and hereinafter contained, the defendant Edgar A. Sadler shall sell the real property known and referred to herein as the Diamond Valley Ranch for the best price obtainable, but not less than the appraised value thereof unless authorized by the Court, said appraisement to be made by three appraisers: One to be appointed by defendant Edgar A. Sadler, one to be appointed by plaintiff, and the third to be appointed by the Court. And that within said period of six months said defendant Edgar A. Sadler shall account for the cattle on the ranch March 2, 1918, and for all properties, real and personal, received by him from, on account of, or through said Agreement, Exhibit "L"; and that he give an account of all his disbursements in connection with the said properties, and the Court hereby retains jurisdiction of this action for the making of such order or orders as may be necessary to provide for the time, place and manner of such accounting.

3. The Court retains jurisdiction of this action to hear, consider and determine applications on the part of beneficiaries other than the plaintiff to share in the trust property. *Payne v. Hook*, 19

L. Ed. 260. Jurisdiction is retained for such other and further orders as may be required to enforce all of the provisions of the trust hereby found to exist.

Let Judgment Be Entered Accordingly.

Dated: This 19th day of June, 1947.

ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed June 19, 1947. [157]

[Title of District Court and Cause.]

STATEMENT OF DOCKET ENTRIES
OF JUNE 19, 1947

1. Filing Opinion and Findings of Fact and Conclusions of Law.

2. Judgment entered this day as follows: That defendant Edgar A. Sadler holds and possesses the Diamond Valley Ranch, mentioned and described in the Amended Complaint and exhibits attached to the original Complaint, and appurtenances, live-stock, equipment and other personal property upon said ranch March 2, 1918, and the increase and proceeds thereof, in trust for plaintiff Clarence Sadler, the heirs of Alfred R. Sadler, deceased, Edgar L. Plummer and for defendant Edgar A. Sadler, in the amount and shares to which each of the above named individuals may be entitled by the terms of the last will and testament of Reinhold Sadler, deceased, and the Statutes of Descent of the State of Nevada. That within six months from

the date of the filing and entry of the decree made pursuant to these Findings and Conclusions of Law herein and hereinafter contained, the defendant Edgar A. Sadler shall sell the real property known and referred to herein as the Diamond Valley Ranch for the best price obtainable, but not less than the appraised value thereof unless authorized by the Court, said appraisement to be made by three appraisers: One to be appointed by defendant Edgar A. Sadler, one to be appointed by plaintiff, and the third to be appointed by the Court. And that [158] within said period of six months said defendant Edgar A. Sadler shall account for the cattle on the ranch March 2, 1918, and for all properties, real and personal, received by him from, on account of, or through said agreement, Exhibit "L"; and that he give an account of all his disbursements in connection with the said properties, and the Court hereby retains jurisdiction of this action for the making of such order or orders as may be necessary to provide for the time, place and manner of such accounting. The Court retains jurisdiction of this action to hear, consider and determine applications on the part of beneficiaries other than the plaintiff to share in the trust property. Jurisdiction is retained for such other and further orders as may be required to enforce all of the provisions of the trust hereby found to exist.

Dated: July 21, 1947.

[Seal] AMOS P. DICKEY,
Clerk.

By /s/ DAN MURPHY,
Deputy Clerk. [159]

In the District Court of the United States of
America in and for the District of Nevada

No. 371

CLARENCE T. SADLER,

Plaintiff,

vs.

EDGAR A. SADLER,

Defendant.

JUDGMENT AND DECREE

This action duly and regularly came on for trial before the Court entitled above, sitting without a jury, upon the amended complaint of Clarence T. Sadler, plaintiff, and the answer of Edgar A. Sadler, defendant, plaintiff being present in person and with his attorneys, Springmeyer & Thompson, and defendant being present in person and with his attorneys, H. R. Cooke and John D. Furrh, Jr.;

And evidence, both oral and documentary, having been adduced on behalf of the respective parties and the Court having duly considered the same and the arguments and written briefs made and filed on behalf of the respective parties;

And the Court, being fully advised in the premises, having on June 19, 1947, made and filed herein its Opinion and Findings of Fact and Conclusions of Law, and having ordered that judgment be entered accordingly; [160]

Now, Therefore, It Hereby Is Ordered, Adjudged and Decreed:

1. That defendant Edgar A. Sadler holds and possesses the Diamond Valley Ranch, and appurtenances, livestock, equipment and other personal property upon said ranch March 2, 1918, and the increase and proceeds thereof, in trust for plaintiff Clarence Sadler, the heirs of Alfred R. Sadler, deceased, Edgar L. Plummer and for defendant Edgar A. Sadler, in the amount and shares to which each of the above named individuals may be entitled by the terms of the last will and testament of Reinhold Sadler, deceased, and the Statutes of Descent of the State of Nevada; that said Diamond Valley Ranch is situated in Eureka County, Nevada, and is particularly described as follows:

The East half of the Northeast quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section Twelve (12); the Northeast quarter ($NE\frac{1}{4}$); the South half ($S\frac{1}{2}$); and the Southwest quarter of the Northwest quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section Thirteen (13); the East half of the East half ($E\frac{1}{2}$ of $E\frac{1}{2}$) of Section Twenty-three (23); all of Section Twenty-four (24); the North half ($N\frac{1}{2}$); and the North half of the South half ($N\frac{1}{2}$ of $S\frac{1}{2}$) of Section Twenty-five (25); and the East half of the Northeast quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section Twenty-six (26); all in Township Twenty-four (24) North, Range Fifty-two (52) East, Mount Diablo Base and Meridian; also the Southwest quarter of the Southwest quarter

(SW $\frac{1}{4}$ of SW $\frac{1}{4}$) of Section Seventeen (17); and Southwest quarter (SW $\frac{1}{4}$); the West half of the Southeast quarter (W $\frac{1}{2}$ of SE $\frac{1}{4}$), and the Southeast quarter of the Southeast quarter (SE $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section Eighteen (18); the West half (W $\frac{1}{2}$); and the West half of the East half (W $\frac{1}{2}$ of E $\frac{1}{2}$) of Section Nineteen (19); the Southwest quarter of the Northwest quarter (SW $\frac{1}{2}$ of NW $\frac{1}{4}$) of Section Twenty-nine (29); and the North half (N $\frac{1}{2}$) of Section Thirty (30); all in Township Twenty-four (24) North, Range Fifty-three (53) East, Mount Diablo Base and Meridian; containing approximately Three Thousand One Hundred Twenty (3120) acres, and constituting what is commonly known as the Diamond Valley Ranch.

Together with all the waters of the Big Shipley Springs flowing, or to flow to, over or through said lands hereinbefore described, together with all water, water rights, dams, ditches, flumes, water-ways and privileges used for the irrigation of said lands from said springs, and also with all of the water of those certain springs, situate in the Northeast quarter (NE $\frac{1}{4}$) of Section Twenty-six (26) Township Twenty-four (24) North, Range Fifty-two (52) East, Mount Diablo Base and Meridian, flowing or to flow to, over or through said lands hereinbefore described, together with all the water, water rights, dams, ditches,

flumes, water-ways and privileges used for the irrigation of said lands from said springs;

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

2. That within six months from the date of the filing and entry of this decree the defendant Edgar A. Sadler shall sell the real property known and referred to herein as the Diamond Valley Ranch for the best price obtainable, but not less than the appraised value thereof unless authorized by the Court, said appraisement to be made by three appraisers; one to be appointed by defendant Edgar A. Sadler, one to be appointed by plaintiff, and the third to be appointed by the Court. And that within said period of six months said defendant Edgar A. Sadler shall account for the cattle on the ranch March 2, 1918, and for all properties, real and personal, received by him from, on account of, or through said Agreement, Exhibit "L"; and that he give an account of all his disbursements in connection with the said properties, and the Court hereby retains jurisdiction of this action for the making of such order or orders as may be necessary to provide for the time, place and manner of such accounting.

3. The Court retains jurisdiction of this action to hear, consider and determine applications on the part of beneficiaries other than the plaintiff to share

in the trust [162] property. Jurisdiction is retained for such other and further orders as may be required to enforce all of the provisions of the trust hereby found to exist.

4. That plaintiff Clarence T. Sadler have judgment against defendant Edgar A. Sadler, for his costs and disbursements taxed herein at the sum of \$72.60.

Dated: June 19th, 1947.

ROGER T. FOLEY,
District Judge.

[Endorsed]: Filed Aug. 6, 1947. [163]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS (UNDER RULE
73(b))

Notice Is Hereby Given that Edgar A. Sadler, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment made and entered in the above-entitled action on June 19, 1947, in favor of the above named plaintiff and against the above named defendant, and from the whole thereof.

/s/ JOHN D. FURRH, JR.,

/s/ H. R. COOKE,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed July 16, 1947. [164]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents: That we, Edgar A. Sadler, of Eureka, Eureka County, Nevada, as principal, and the American Surety Company of New York, a corporation organized under the laws of the State of New York and duly qualified to transact a surety business in the State of Nevada, as surety, are held and firmly bound unto the above named plaintiff, Clarence T. Sadler, in the sum of Two Hundred and Fifty Dollars (\$250.00), lawful money of the United States of America, to be paid to the said plaintiff, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12th day of July, 1947.

The condition of the above obligation is such that, Whereas on June 19, 1947, a judgment and decree was entered against the defendant, Edgar A. Sadler, in the above-entitled action and said defendant and appellant, Edgar A. Sadler, appeals to the United States Circuit Court of Appeals for the Ninth Circuit;

Now Therefore, if the said Edgar A. Sadler shall prosecute an appeal with effect and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the

judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

Signed and Sealed and dated this 12th day of July, 1947.

EDGAR A. SADLER,
Principal.

[Corporate Seal]

AMERICAN SURETY
COMPANY OF NEW YORK.

By HOWARD PARISH,
Resident Vice President.

JOHN T. McLAUGHLIN,
Resident Asst. Secretary.

State of Nevada,
County of Washoe—ss.

On this 15th day of July, 1947, before me, a Notary Public, personally appeared John T. McLaughlin, known to me to be the Resident Asst. Secretary of the corporation that executed the foregoing instrument, and upon oath did depose that he is the officer of said corporation as above designated; that he is acquainted with the seal of said corporation, and that the seal affixed to said instrument is the corporate seal of said corporation; that the signatures to said instrument were made by the officers of said corporation as indicated after said signatures, and that the said corporation executed the

said instrument freely and voluntarily and for the purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, the day and year in this Certificate first above written.

[Seal] ETHEL F. SAVAGE,
Notary Public.

[Endorsed]: Filed July 16, 1947. [166]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Point 1.

The Trial Court should have granted the motion of defendant Edgar A. Sadler for dismissal of the original Complaint, or in the alternative, that plaintiff be required to make a more definite statement of matters in the Notice of Motion particularly set out. Said Notice of Motion being served on October 16, 1944, filed herein on October 17, 1944, and which Motion was denied January 17, 1945. [167]

Point 2.

The Trial Court should have granted the Motion by defendant Edgar A. Sadler for dismissal of plaintiff's Amended Complaint, notice of which motion was dated February 17, 1945, served on February 19, 1945, and filed herein on February 20, 1945, and which Motion was denied October 17, 1945.

Point 3.

The Trial Court should have granted the Motion of defendant Edgar A. Sadler for a dismissal of plaintiff's action for lack of jurisdiction by said court over the subject matter, and for the further reason that plaintiff's Amended Complaint failed to state a claim upon which relief could be granted. Notice of which motion was served August 1, 1946, and filed herein August 2, 1946.

Point 4.

That Finding No. 2 that Reinhold Sadler at the time of his death on January 29, 1906, was the owner of and in the possession of certain shares of stock in the Huntington Valley Stock and Land Company is without support in the evidence and is contrary thereto.

Opinion and Findings
Finding No. 2, Page 5

Point 5.

That Finding No. 6 that Exhibit C attached to the original Complaint, being a stipulation made on or about February 14, 1918, between plaintiff and defendants in the action therein referred to, whereby it was stipulated that the legal title to the [168] said lands and property be transferred to Edgar A. Sadler and Alfred R. Sadler, is in error, in that said stipulation provides that judgment may be entered that Edgar and Alfred Sadler were the own-

ers and entitled to the possession of the Diamond Valley Ranch and that none of the other parties to action had any right, title or estate in the property or any part thereof; that said stipulation was in no way restricted or limited to the bare "legal" title.

Opinion and Findings

Finding No. 6, Page 7

Point 6.

That said Finding No. 6 that said stipulation was entered into by the parties thereto pursuant to an agreement between them that said Edgar A. Sadler and Alfred R. Sadler would acquire and hold the legal title to said real property and would take and hold possession of the livestock, ranch and equipment and other personal property situated thereon in trust for the heirs of Reinhold Sadler, deceased, is without support in the evidence and contrary thereto.

Opinion and Findings

Finding No. 6, Page 7

Point 7.

That Finding No. 9 that the defendant, Edgar A. Sadler, made or signed the written memorandum of the referred to agreement to hold in trust for the heirs of said Reinhold Sadler, deceased, the Diamond Valley Ranch and all livestock and other personal property upon said ranch is without support in the evidence and contrary thereto. That said written memorandum, if same was ever signed by

Edgar A. Sadler, does not mention personal property upon said [169] ranch, nor does it mention or include all livestock, but merely refers to "ranch cattle."

Opinion and Findings

Finding No. 9, Page 8

Point 8.

That the Finding No. 12 that there was no denial, disclaimer or repudiation by defendant Edgar A. Sadler to plaintiff of the trust relationship (as found by the court) at any time prior to March 5, 1944, is without support in the evidence and is contrary thereto, in that the uncontradicted evidence (Letter of plaintiff to Alfred dated July 28, 1932. Ex. N) shows that at least as early as July 28, 1932, Edgar A. Sadler had repudiated the "trust" claimed by plaintiff, and that said plaintiff as well as his attorney-in-fact had full notice and knowledge of defendant's said acts.

Opinion and Findings

Finding No. 12, Page 9

Point 9.

The Court's Finding No. 12 that plaintiff's cause of action is not barred by Section 8524, Nevada Compiled Laws 1929, nor by Subsection 4 of Sec. 8524 N.C.L., nor by any other statute of limitations, has no support in the evidence and is contrary thereto, in that, inter alia:

(a) Defendant's action in executing and recording of different chattel mortgages in his

sole name as mortgagor, commencing as early as March 28, 1929, and known to plaintiff, starts statute to run.

(b) Plaintiff's letters, particularly Ex. N, dated July 28, 1932, showing knowledge by plaintiff of Edgar Sadler having (according to plaintiff) wrongfully appropriated and converted [170] to his own use, the cattle claimed by plaintiff and found by the court to be a part of said "trust."

(c) Plaintiff's attorney-in-fact Alfred R. Sadler's letter of September 13, 1937, Ex. K, showing plaintiff knew Edgar Sadler had sold 800 head of the cattle for \$60.00 per head, aggregating \$48,000.00, and retained the money as his own.

Opinion and Findings
Finding No. 12, Page 9

Point 10.

That the Finding No. 13 that the rights, claims, demands or causes of action of the plaintiff as alleged in the Complaint are not barred by the laches of plaintiff in failing to seasonably assert his alleged rights and commence his action for the recovery of same; that plaintiff has not been guilty of laches in the bringing and maintaining of this action, is without support in the evidence and contrary thereto in that the uncontradicted evidence is, inter alia:

(a) Plaintiff's letter of July 28, 1932, Ex. N, showing plaintiff then knew of repudiation by defendant of any trust.

(b) Letter of plaintiff's attorney-in-fact Alfred Sadler of September 13, 1937, Ex. K, wherein reference is made to Edgar selling about 800 head of cattle for \$60.00 per head.

(Defendant never made any account or report of said transaction, and plaintiff never requested any.)

Opinion and Findings

Finding No. 13, Page 10

Point 11.

That the Trial Court's Finding No. 13, concluding sentence of Subparagraph (a) thereof, that all the cattle, to-wit: 250 head, more or less, on the Diamond Ranch on March 2, 1918, and described in defendant's Exhibit A, were held in trust by Alfred and Edgar A. Sadler for themselves and other heirs of Reinhold Sadler, deceased is, as to 200 head of cattle, without support in the evidence and contrary thereto, in that the uncontradicted evidence, *inter alia*, is that:

(a) Said 200 head were branded (), the personally owned brand of defendant, and were described by said brand in the real and chattel mortgage, Ex. A, made by Alfred and Edgar on March 2, 1918, and the so-called Ranch cattle were therein described as branded J-C;

(b) Plaintiff had notice as early as March 28, 1929, Ex. S, that Edgar was mortgaging the cattle (now claimed to be trust property) in his own name, which was followed with some 8 ad-

ditional mortgages on cattle, to the exclusion of Alfred, and of course in flagrant breach of the "trust" as plaintiffs now contends for;

(c) Plaintiffs admits (Transcript 525) that "Prior to Alfred's death he (Edgar) said I had no interest in the ranch," in answer to question as to the first intimation he had that Edgar had repudiated this "trust."

Opinion and Findings

Finding No. 13, Subpar.

(a), P. 10

Point 12.

That the Trial Court's conclusion of law No. 1, that defendant Edgar A. Sadler holds and possesses the said Diamond [172] Valley Ranch with appurtenances, livestock, and other personal property upon said Ranch on March 2, 1918, and the increase and proceeds thereof, in trust for plaintiff, the heirs of Alfred R. Sadler, deceased, Edgar L. Plummer and defendant, according to the last will of Reinhold Sadler, deceased, and the statutes of descent of Nevada, is contrary to law, is without support in the evidence, and is contrary thereto.

Opinion and Conclusions

Conclusion No. 1, Page 10

Point 13.

That the Trial Court's Conclusion of Law No. 2 is contrary to law, without evidence in support, and contrary thereto.

Opinion and Conclusions

Conclusion No. 2, Page 11

Point 14.

That the Trial Court's Conclusion of Law No. 3 is contrary to law, without evidence in support, and contrary thereto.

Opinion and Conclusions

Conclusion No. 3, Page 11

Point 15.

That the Trial Court should have found that defendant's first affirmative defense (Statute of Limitations) was well founded and true.

Point 16.

That the Trial Court should have found that defendant's second affirmative defense (Laches) was well founded and true.

Point 17.

That the Trial Court should have found that defendant's [173] third affirmative defense (absence of indispensable parties) was well founded and true.

Point 18.

That the Trial Court should have found that defendant's fourth affirmative defense (No consideration for alleged Trust) was well founded and true.

Point 19

That the Trial Court should have found that defendant's fifth affirmative defense (Statute of Frauds) was well founded and true.

Point 20.

That the Trial Court should have found that defendant's sixth affirmative defense (Rule against Perpetuities) was well founded and true.

/s/ JOHN D. FURRH, JR.,

/s/ H. R. COOKE,

Attorneys for Defendant and
Appellant.

[Endorsed]: Filed July 16, 1947. [174]

[Title of District Court and Cause.]

ACCEPTANCE OF SERVICE

Due service of the Notice of Appeal to the Circuit Court of Appeals, Bond for Costs on Appeal, and Statement of Points on which Appellant intends to Rely on Appeal, admitted, by copy, this 15th day of July, 1947.

SPRINGMEYER &

THOMPSON,

Attorneys for Plaintiff.

[Endorsed]: Filed July 16, 1947. [175]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above-entitled court:

You are hereby requested to make a Transcript of Record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal in the above-entitled cause, and to include in such Transcript of Record the following:

1. Original Complaint (with Exhibits A, B, C, D, I and L annexed)—filed September 16, 1944;

Notice of Motion by defendant to Dismiss Complaint, or in the alternative, to strike a portion thereof, and to make more definite.—Filed October 17, 1944. [176]

File Order of Court denying said Motion, made January 17, 1945.

2. Amended Complaint, filed February 2, 1945, with Amendment to Amended Complaint, dated May 31, 1946.

Notice of Motion by defendant to Dismiss plaintiff's Amended Complaint, dated February 17, 1945, served February 19, 1945, and filed February 20, 1945.

File Order of Court denying said Motion, made October 17, 1945.

3. Notice of Motion by defendant for Dismissal of plaintiff's action for lack of jurisdiction over the subject matter and for the further reason plaintiff's Amended Complaint failed to state a claim

upon which relief could be granted. Served August 1, 1946, and filed herein August 2, 1946.

Order Denying said Motion, made September 18, 1946.

4. Answer of Defendant Edgar A. Sadler, filed herein on November 17, 1945, with Amendment to Paragraph II thereof as later allowed by the Court.

5. Trial Court's Opinion and Findings of Fact and Conclusions of Law, together with direction of entry of Judgment, dated and filed June 19, 1947.

6. Judgment and Decree appealed from.

7. Relevant Docket Entries.

8. Exhibits as Follows:

Plaintiff's Exhibits 5, 6, 7, 9, 14, 17, 18, 19, 20, 21, 22, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 43.

Defendant's Exhibits C, D, E, F, H, K, F-1.

9. Transcript of entire proceedings as reported and [177] certified by the Court Reporter as of date December 4, 1946, consisting of Volumes I and II.

10. Notice of Appeal, filed herein on July 16, 1947.

11. Bond for Costs on Appeal, filed herein on July 16, 1947.

12. Statement of Points on Which Appeallant Intends to Rely on Appeal, filed herein on July 16, 1947.

13. This Praecipe and service thereon.

Said Transcript to be prepared as required by law and the Rules of this Court and the Federal Rules of Civil Procedure, and to be filed in the office of the Clerk of the Ninth Circuit Court of Appeals on or before the day of, 1947.

Dated: July 19, 1947.

/s/ H. R. COOKE,
/s/ JOHN D. FURRH, JR.,
Attorneys for Defendant
and Appellant.

Service, by copy, of the foregoing Designation of Record admitted this 19th day of July, 1947.

SPRINGMEYER &
THOMPSON,
Attorneys for Plaintiff
and Respondent.

[Endorsed]: Filed July 19, 1947. [178]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated that the carbon copy of the official court reporter's Transcript as certified by her, and now on file with the Clerk of the above-entitled Court, may be transmitted to the United States Court of Appeals, Ninth Circuit, as an original; same being for use of the appellate court in

printing the record, as provided for by Rule 75, subparagraph (b) of the Rules of Civil Procedure.

Dated: July 25, 1947.

SPRINGMEYER &

THOMPSON,

Attorneys for Plaintiff.

JOHN D. FURRH, JR.,

H. R. COOKE,

Attorneys for Defendant.

ORDER

The foregoing Stipulation being submitted to the Court with the application of defendant for the order referred to, and it appearing to be a proper case:

It Is Ordered: That the carbon copy of the official court reporter's Transcript as certified by her, and now on file in the office of the Clerk of the above-entitled Court, may be sent up to the United States Circuit Court of Appeals, Ninth Circuit, as an original and for the use of said appellate court in printing the Record.

Dated: August 1, 1947.

ROGER T. FOLEY,

U. S. District Judge.

[Endorsed]: Filed Aug. 1, 1947. [180]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF ORIGINAL
EXHIBITS TO APPELLATE COURT

On Motion of the attorneys for plaintiff named above, it appearing to the satisfaction of the Court that the original exhibits described in said motion should be sent to and inspected by the United States Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal in the action entitled above, and good cause appearing therefor in accordance with the provisions of Rule 75(i) of the Federal Rules of Civil Procedure;

It Hereby Is Ordered that the Clerk of the Court entitled above transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit by registered mail for inspection by said Court as part of the record on appeal in this action the following original exhibits: Plaintiff's Exhibits Nos. 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16.

It Further Is Ordered that upon the final conclusion of the appellate proceedings in this action said exhibits be returned by [181] registered mail to the Clerk of the Court entitled above.

Dated: July 30, 1947.

/s/ ROGER T. FOLEY,
District Judge.

[Endorsed]: Filed Aug. 5, 1947. [182]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET AND
FILE RECORD IN CIRCUIT COURT OF
APPEALS

Upon motion of Amos P. Dickey, Clerk, U. S. District Court, and good cause appearing therefor,

It Is Hereby Ordered that the time within which the above entitled cause may be docketed and the record thereof filed with the Clerk of the Circuit Court of Appeals in and for the Ninth Circuit be, and the same hereby is, extended to and including September 15, 1947.

Dated: August 19th, 1947.

/s/ ROGER T. FOLEY,

United States District Judge,
District of Nevada.

[Endorsed]: Filed Aug. 19, 1947. [183]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK,
U. S. DISTRICT COURT

United States of America,
District of Nevada—ss.

I, Amos P. Dickey, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District

Court for the District of Nevada, including the records, papers and files in the case of Clarence T. Sadler, Plaintiff, vs. Edgar A. Sadler, Defendant, No. 371, on civil docket of said court.

I further certify that the attached transcript consisting of 185 typewritten pages numbered from 1 to 185, inclusive, contains a full, true and correct transcript of the proceedings in said matter and of all papers filed therein, together with the endorsements of filing thereon, as set forth in "Appellant's Designation of Record" filed July 19, 1947, all of which are filed in this case and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

I further certify that, pursuant to Order of Court, which Order is made a part of this transcript, the following original exhibits were transmitted to the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit by registered mail under separate [184] cover: Plaintiff's Exhibits Nos. 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16.

I further certify that accompanying this record on appeal, pursuant to stipulation and order of this Court, both of which are made a part of this transcript, is the carbon copy of the official court reporter's Transcript as certified by her, and now on file in this office and is sent up to the United States Circuit Court of Appeals for the Ninth Circuit as an original and for the use of said appellate Court in printing the record.

And I further certify that the cost of preparing and certifying to said record, amounting to \$46.10 has been paid to me by H. R. Cooke, Esq., and John D. Furrh, Jr., Esq., attorneys for the appellant.

Witness my hand and the seal of said United States District Court this 26th day of August, 1947.

[Seal]

AMOS P. DICKEY,

Clerk, U. S. District Court.

By /s/ J. P. FODRIN,

Deputy. [185]

In the District Court of the United States,
in and for the District of Nevada

Before: Hon. Roger T. Foley,
Judge.

No. 371

CLARENCE T. SADLER,

Plaintiff,

vs.

EDGAR A. SADLER and KATHRYN POWERS
SADLER, as administratrix of the Estate of
Alfred R. Sadler, deceased,

Defendants.

TRIAL

Be It Remembered, That the above entitled matter came on regularly for trial before the Court

sitting without a jury, at Reno, Nevada, on Monday, the 14th of October, 1946, at 10:00 o'clock a.m., Hon. Roger T. Foley, Judge, presiding.

Appearances:

George Springmeyer, Esq., Bruce R. Thompson, Esq., Attorneys for Plaintiff.

H. R. Cooke, Esq., John D. Furrh, Esq., Attorneys for Defendant Edgar A. Sadler.

The following proceedings were had:

Mr. Thompson: Does your Honor desire a summary of the proceedings?

The Court: Perhaps it would be well to give a brief summary of the pleadings. [1*]

Mr. Thompson: In this case, your Honor, the plaintiff, in his complaint, has alleged that Reinhold Sadler, who is the husband of Louisa Sadler and the father of Edgar Sadler, Bertha Sadler, Clarence Sadler and Alfred Sadler, died on January 29, 1906. We have alleged that at the time of his death he was the owner of certain shares of stock in the Huntington & Diamond Valley Land & Stock Company, a California corporation, and was the owner of certain real property in Eureka County, Nevada, known as the Diamond Valley Ranch. The allegation of his ownership of the stock in the corporation and of the real property in Eureka County at the time of his death have been denied by the defendant, Edgar Sadler. The plaintiff further has alleged that on December 31, 1915, a quiet title action was commenced in Elko County, Nevada,

* Page numbering appearing at foot of page of Reporter's certified Transcript of Record.

whereby the Huntington & Diamond Valley Land & Stock Company sought to quiet title to certain lands in Elko, White Pine, and Eureka Counties, Nevada, and as part of those lands there was included the Diamond Valley Ranch situated in Eureka County, Nevada. We have alleged that on February 14, 1918, the parties to that action, and among the defendants to that action were Louisa Sadler as administratrix of the Estate of Reinhold Sadler, deceased, Edgar Sadler, this defendant, Clarence Sadler, this plaintiff, Bertha Sadler, a sister, and Alfred Sadler, a brother of Edgar and Clarence, all those parties were among defendants in the quiet title case. We [2] have alleged and it has been admitted that stipulation was entered into on February 14, 1918, whereby and pursuant to which a consent decree quieting title was entered on March 2, 1918. The stipulation provided that the plaintiff's title, that is the Huntington & Diamond Valley Land & Stock Company's title, to the lands in Elko and White Pine County should be quieted in the plaintiff corporation and that the title to the land in Eureka County, Nevada, which is known as the Diamond Valley Ranch, should be quieted in Edgar and Alfred Sadler. The plaintiff has alleged that this stipulation was entered into pursuant to an agreement between all the heirs of Reinhold Sadler, deceased, who included at that time the living heirs, Louisa A. Sadler, his widow, Edgar Sadler, Alfred Sadler, Clarence Sadler and Bertha Sadler, whereby it was agreed that the ranch would be mortgaged for sufficient to pay the plaintiffs in the quiet title

suit \$15,000 and to pay the attorney fees in the sum of \$1500 and that Edgar and Alfred Sadler would hold the property in trust for all heirs of Reinhold Sadler, deceased, according to the provisions of Reinhold Sadler's will, a copy of which is attached to the complaint as an exhibit and has been admitted by the defendant. The plaintiff also has attached, as part of his pleadings, a memorandum of agreement dated March 2, 1918, which sets forth the essential provisions of the trust agreement and which is purportedly signed by Alfred Sadler and Edgar Sadler, the trustees. The defendant, Edgar Sadler, has denied the making of the agreement as alleged, on which the stipulation for the settlement of the quiet title suit was allegedly based, and has denied that he signed the memorandum of agreement dated March 2, 1918. The plaintiff seeks to impose a trust on the ranching property known as the Diamond Valley Ranch situated in Eureka County, Nevada, for the benefit of all the heirs of Reinhold Sadler, deceased, according to the trust agreement as completed. In addition to the facts as I have stated them, the complaint sets up that after the decree quieting title was entered, the plaintiff corporation in the quiet title suit, the Huntington & Diamond Valley Land & Stock Company, through its attorney in fact, Herman Sadler, deeded the property known as the Diamond Valley Ranch to Edgar and Alfred Sadler and that the deed was later confirmed by a deed from the corporation itself. The plaintiff asks that a trust be impressed on this ranching property, also on the

cattle, machinery and equipment on the ranch and used in connection therewith, which were included in the trust agreement dated March 2, 1918.

As we understand the pleadings, the disputed issues, from plaintiff's point of view, are the ownership by Reinhold Sadler of the ranch in Eureka County, Nevada, and of the stock in the Huntington & Diamond Valley Land & Stock Company at the time of his death and the making and entering into of the trust agreement as alleged in the complaint. Those are the two principal [4] disputed issues, so far as the plaintiff is concerned.

The Court: Would you mind repeating those again.

Mr. Thompson: The first issue is whether Reinhold Sadler, the father, at the time of his death in January, 1906, owned the Diamond Valley Ranch and owned stock in the Huntington & Diamond Valley Land & Stock Company, a California corporation. The defendant, Edgar Sadler, by virtue of an amendment to his answer, has denied that allegation.

The second principal issue is whether the trust agreement was entered into in February, 1918, as alleged, and whether Edgar Sadler did sign the memorandum of that agreement dated March 2, 1918, a copy of which is attached to the complaint as Exhibit "L."

At this time we would like to suggest to the Court that in this trial the point at issue is whether the property described in the complaint and in the amended complaint should be impressed with a trust for the benefit of plaintiff and the other heirs

of Reinhold Sadler. In accordance with good practice, we do not believe that the question of an accounting should be gone into at this time. As we understand the law with reference to orderly procedure in cases of this character, the courts do not try the question of an accounting until they first determine whether there is a trust, whether the defendant is a trustee and should be required to account. If the court should decree a trust in accordance [5] with the complaint as a part of the decree, the court may and should order an accounting, but the trial at this time should not be confused with issues regarding an accounting before the principal issue of whether an accounting is necessary is first determined.

The Court: Perhaps counsel will agree with that, that that would be the proper procedure.

Mr. Cooke: Yes, we made that suggestion in previous proceedings.

Mr. Thompson: The defendant, Edgar Sadler, your Honor, has set up some affirmative defenses which he might wish to explain to your Honor.

The Court: Do you desire to make any statement of the issues, Mr. Cooke?

Mr. Cooke: I first wish to make a motion that the judgment be entered against the plaintiff in favor of the defendant, Edgar Sadler, based upon counsel's statement of his case, upon the ground that the statement made by counsel, taken in connection with the admitted allegations and with the admitted documents already before the Court, does not show a case where this court would, in the exercise of its equity powers, have any authority to

decree a trust. This general ground is based upon the proposition that they are relying, the plaintiff's case is in reliance, upon an oral agreement made preliminary to the so-called written trust agreement that counsel has referred to of March 2, 1918, which Mr. Edgar Sadler denies but which, for the purpose of the motion, of course, will be admitted. The point we make there is that that agreement of March 2, 1918, cannot be enlarged or broadened in its scope to any extent whatsoever by any preliminary oral arrangements or agreements made between the parties. Your Honor may recall that that matter came up before, at which time the proposition was sharply presented that under the statute of authorities in Nevada no oral agreement, purporting to create a trust on real property, is allowed. It is a very positive mandate of the statute and your Honor will recall that in this case it was alleged that in February, I think it was, 1918, the parties had an agreement. They don't say oral, but I think that in the pre-trial conference that that was established, whatever it was at that time, was an oral arrangement that they would have this trust agreement, but whatever that agreement was is disposed of by the further allegations in their complaint that that agreement, the agreement between the parties—I undertake to say that that means the whole of the agreement—was reduced to writing and that is found in this Exhibit "L" of March 2, 1918, which your Honor may recall recites that the ranch and the cattle shall be disposed of at the first good opportunity to get a good price

and the lawyers' fees paid and the proceeds divided among the heirs of Reinhold Sadler, as stated in his will. [7]

The point I am trying to make there is, your Honor, that, firstly, Exhibit "L" is not a trust agreement. It does not state any of the essential elements of a trust agreement and that a preliminary agreement, such as they injected into this case by amendment, an oral agreement, enlarging it and broadening it and designating the trust, there wasn't any trust agreement before the Court, therefore, according to counsel's own statement, no case is made to the Court when you apply the law, for the Court to decree a trust. I am making that for the purpose of the record and such action as the Court sees fit to take.

The Court: The motion is denied without any prejudice to consideration of similar points during the course of the trial or at the conclusion of the trial. Do you want to make any statement in regard to the issues of the trial?

Mr. Cooke: Either now or later.

The Court: You do not have to do it now. Are you ready to proceed, Mr. Thompson?

Mr. Thompson: We are ready, your Honor.

The Court: I take it you do not care to make a statement now, Mr. Cooke?

Mr. Cooke: Yes, your Honor, I do.

The Court: Go ahead. [8]

Statement by Mr. Cooke.

Mr. Thompson: Mr. Edgar Sadler, will you be sworn for cross-examination under the rule, please?

EDGAR SADLER

being first duly sworn, testified under the rule as follows:

Examination

By Mr. Thompson:

Q. Your name is Edgar Sadler?

A. Yes, sir.

Q. You are the defendant in this case we are trying now? A. Yes, sir.

Q. When were you born, Mr. Sadler?

A. September 29, 1876.

Q. Where were you born? A. Eureka.

Q. In the city of Eureka?

A. In the town of Eureka, no city.

Q. That is Eureka, Nevada? A. Yes.

Q. Were your parents Reinhold S. and Louisa Sadler living on a ranch in Eureka County at that time? A. No, sir.

Q. They were living in the town of Eureka?

A. Yes, sir.

Q. Are you familiar with the ranching property in Eureka County, Nevada, known as the Diamond Ranch? [9] A. Yes, sir.

Q. And that is the same property, the title to which was decreed to you and Alfred Sadler in the quiet title suit in Elko County on March 2, 1918?

A. Yes, sir.

Q. And that property is described in that decree, is it? A. Yes, sir.

Q. When did you first live on the Diamond Ranch?

(Testimony of Edgar Sadler.)

A. Well, I lived there off and on for pretty near 55 years. I lived on the Huntington Ranch part of the time.

Q. The Huntington Ranch is not part of it?

A. Well, it is according to where I lived. I lived there part of the time and then I lived at the Diamond Ranch.

Q. You say you have lived there most of the time throughout your life, is that right?

A. For the most of it.

Q. Did you ever have any employment other than as a ranch owner and manager?

A. Oh, I was in politics. I was in the Assembly and I was a senator and I was commissioner.

Q. County commissioner? A. Yes.

Q. For Eureka County? A. Yes.

Q. When was that? [10]

A. I can't give the dates.

Q. And when was it, for the 35th session of the Legislature, you were assemblyman from Eureka County, that was in 1931?

A. No, I was in 1931 and 1932, I think.

Q. You were an assemblyman? A. Yes.

Q. And later, 1937 I believe it was, you were in the Senate, I believe, from Eureka County, were you not? A. Yes, sir.

Q. Other than your commissioner office, have you had any other employment, gainful employment, other than ranching, as ranch manager?

A. Oh, I ran a stage there for a while.

(Testimony of Edgar Sadler.)

Q. When was that?

A. Oh, I think it was 1915 or somewhere along in there.

Q. Most of your life though you have lived on the Diamond Ranch, have you not?

A. Most of it.

Q. When were you married?

A. September 11, 1907; I think that is right.

Q. And your wife is Ethel Sadler?

A. Yes.

Q. She is still living, is she not?

A. Yes, sir.

Q. Do you recall your father's, Reinhold Sadler, death in January, 1906? [11]

A. Oh, yes.

Q. And where were you living at that time?

A. At the ranch.

Q. And that is at the Diamond Ranch?

A. Yes.

Q. And you were engaged in running that ranch, is that true?

A. Yes.

Q. And that was your means of livelihood at that time?

A. Oh, I guess so.

Q. And has that continued to be your means of livelihood down to and including the present time?

A. Well, I guess it has.

Q. Well, since 1907, you have been living continuously on the Diamond Ranch, have you not?

A. Yes, I have been living there.

Q. And you have been devoting most of your time to managing and operating that ranch?

A. Oh, yes.

(Testimony of Edgar Sadler.)

Q. At the time your father, Reinhold Sadler, died your mother, Louisa Sadler, was living?

A. Yes.

Q. And she lived until 1923?

A. I think so.

Q. Your brother, Alfred Sadler, was also alive?

A. Yes. [12]

Q. And your brother, Clarence Sadler?

A. Yes.

Q. He is the plaintiff in this case? A. Yes.

Q. Your sister, Bertha Sadler, was also alive at that time? A. Yes.

Q. Do you recall the commencement of the quiet title action by the Huntington & Diamond Valley Land & Stock Company late in 1915 in Elko County?

A. No.

Q. You do not recall that?

A. No, I didn't know anything about it at all. It was started down here.

Q. Were you served with papers in that case?

A. Oh, yes, afterwards.

Q. And you were named as a defendant in that case? A. Yes.

Q. And your brothers, Alfred and Clarence Sadler, were also named as defendants, were they not?

A. I think so.

Q. And your mother, Louisa Sadler, was named as a defendant? A. I think so.

Q. Personally and as administratrix of your father's estate; and your sister, Bertha, was also a defendant? A. Yes. [13]

(Testimony of Edgar Sadler.)

Q. Now at the time that action was commenced, or shortly thereafter, did you and Alfred Sadler arrange with the law firm of Cheney, Downer, Price & Hawkins to represent you in that action?

A. They wouldn't be representing me. They were representing the other party. I had Curler & Castle.

Q. In Elko, Nevada? A. Yes.

Q. And that firm consisted of Mr. H. U. Castle—— A. Yes.

Q. ——and Benjamin L. Curler? A. Yes.

Q. They were partners in law in Elko at that time? A. That's right.

Q. They represented you in the quiet title suit?

A. Yes.

Q. They also represented Alfred Sadler?

A. Well, I don't know. I don't think so. I think they had these lawyers down here.

Q. You and the other members of your family filed a joint answer to the complaint in the quiet title suit, did you not, Mr. Sadler? I show you Exhibit 1 for identification, which purports to be a certified copy of that answer.

A. Well, I guess I signed that.

Q. I think that Alfred Sadler signed it, but it was filed on [14] behalf of all of you, is that not true? A. Yes, I guess so.

Mr. Thompson: I offer the Answer in evidence, your Honor, as Plaintiff's Exhibit 1 for identification. I think Mr. Cooke has already seen it.

Mr. Cooke: This document, your Honor, shows nothing I have seen it before, but haven't given it

(Testimony of Edgar Sadler.)

any special examination, but I do not believe it has any bearing on this case, but we formally object to its admission in evidence on the ground, firstly, that no proper foundation has been laid showing that the defendant, Edgar Sadler, is bound by any of the statements that may be contained in the document; that it purports on its face to be the answer of a number of defendants, including Edgar Sadler, but is verified by Alfred Sadler alone and there is nothing before the Court showing that Edgar Sadler is or should be legally bound by statements made by Alfred Sadler or that he knew anything about what the answer was or that he authorized the making of it or that he authorized Alfred Sadler to verify the answer. Do you mind stating what portion of that Answer has any bearing on this case?

Mr. Thompson: Paragraph 9.

Mr. Cooke: Counsel has mentioned paragraph 9 as being the portion of the document that he thinks has some potential value in this case. We make the further and special objection on the ground that paragraph 9 purports to be a plea [15] on the part of the defendants of five years' adverse possession and that that plea has been disposed of by the entry of the final judgment in the action wherein the title to the properties, other than the property in Eureka County, was adjudicated to the plaintiff, the Huntington & Diamond Valley Corporation, and as to the lands in Eureka County, the property was adjudicated and decreed to Alfred Sadler and to Edgar Sadler, pursuant to a stipulation that was entered

(Testimony of Edgar Sadler.)

into and that, therefore, as we see it, the allegation of paragraph 9, or any plea of adverse possession, would have no bearing or no value in determining the question of whether or not there is a trust existing in the instant case.

The Court: May I see the document, please?

Mr. Thompson: If the Court please, we are entitled to show the circumstances surrounding the execution of this alleged trust agreement. Mr. Edgar Sadler apparently claims he has some special interest in that property and had it at that time. We are entitled to show what the parties claimed at that time as a foundation for an agreement between them. That is a joint answer of all the heirs of Reinhold Sadler in the quiet title action, shows that they got together and made their claim to the ranch together. It shows that it was signed by Castle & Curler, whom Mr. Edgar Sadler has admitted were his authorized agents in that action, representing him, and a judicial admission of that character surely is entitled to [16] weight as evidence. How much weight your Honor will give it is another matter, depending, I assume, on the rest of the evidence in the case, but it is relevant and material. Your Honor will note that Mr. Sadler has denied that Reinhold Sadler owned the property at the time of his death, which amounts to a denial that he claimed his interest in the property as an heir at that time. He apparently claimed some special interest regarding which we are not informed at this time, but we are entitled to show that his claim at that time was as an heir of Reinhold Sadler.

(Testimony of Edgar Sadler.)

Mr. Cooke: No use of my saying what his claims are when we know the court has denied it.

The Court: The exhibit may be admitted in evidence as Plaintiff's Exhibit 1.

Mr. Thompson: Did your Honor read the paragraph I referred to?

The Court: You may read it again so the record will show.

Mr. Thompson: We first make the point, your Honor, that this answer is the joint answer of Louisa Sadler, as administratrix of the estate of Reinhold Sadler, deceased, Louisa Sadler, Edgar Sadler, Bertha Sadler, Alfred Sadler and Clarence Sadler. We also wish to read paragraph 9 of the Answer as follows:

“And further answering said plaintiff's [17] amended complaint, these defendants aver that for more than five years last past, the plaintiff has not been in possession of any of the lands or water rights described in said plaintiff's amended complaint, as situate and being in the County of Eureka, State of Nevada, and that for more than five years last past these defendants, or some of them, have been in the open, exclusive, peaceable and adverse possession of all of the lands and premises and water rights mentioned in said plaintiff's amended complaint, as being and situate in the County of Eureka, State of Nevada, and during said time these defendants, or some of them, have paid the taxes levied and assessed against the said lands and premises in Eureka County, Nevada.”

(Testimony of Edgar Sadler.)

Q. Mr. Sadler, isn't it a fact that after your father's death and prior to the alleged trust agreement of March 2, 1918, and the settlement of the quiet title suit we have mentioned, you claimed your interest in the Diamond Ranch as an heir of Reinhold Sadler, your father? A. No.

Q. Isn't it true, Mr. Sadler, that in the year 1912 you executed and acknowledged a power of attorney, in which you set forth that you claimed your interest in that property as an heir of Reinhold Sadler, deceased, and in which you authorized [18] Alfred Sadler, your brother, to represent you in that capacity?

Mr. Cooke: Show him the document. We object to that method of cross-examination.

Mr. Thompson: All right.

Q. Mr. Sadler, I show you Plaintiff's Exhibit 2 for identification, which purports to be a power of attorney to Alfred R. Sadler, has the signature of Edgar Sadler, acknowledged December 28, 1912, before R. McCharles, County Clerk, Eureka County, filed for record at the request of Edgar Sadler December 30, 1912, by Edgar Eather, County Recorder. Is that not your signature at the bottom of that power of attorney? A. I guess it is.

Q. Is it or isn't it, yes or no?

A. I guess it is.

Q. You think it is your signature? A. Yes.

Mr. Thompson: I offer the power of attorney in evidence, your Honor.

(Testimony of Edgar Sadler.)

Mr. Cooke: We, of course, object to the offer, if the Court please, on the ground it is irrelevant and immaterial and merely encumbers the record of the case with inconsequential matter. It purports on its face to be a power of attorney from Edgar Sadler to Alfred R. Sadler as trustee, to represent Edgar Sadler as an heir-at-law of the estate of Reinhold Sadler, with more particular reference to lands which [19] the Huntington & Diamond Valley Stock & Land Company holds under trust; the lands are situated in White Pine, Elko and Eureka Counties, State of Nevada, and then follows the usual stock provisions of a power of attorney, and it is signed by Edgar Sadler and recorded, as stated by counsel, at Edgar Sadler's request on December 30, 1912. The point of our objection is, your Honor, that all of these documents are antecedent documents to the proceedings of 1918, which resulted in the adjudication of the title to certain lands admittedly in the Huntington Company, notwithstanding whatever may have been claimed before that, and an adjudication in favor of Alfred and Edgar Sadler, unreservedly and unequivocally as to the Diamond Valley Ranch in Eureka County, makes unnecessary a consideration of what the parties said and did years before. This is six years before that, your Honor. Under ordinary rules all those are preliminary arrangements, preliminary claims and all that; whether they were made or not made would not be material. It is the question of the status of that ground and what was done in March, 1918, not what was done six years before or 30 years before, so far

(Testimony of Edgar Sadler.)

as that is concerned. I can't see that anything in this case would be any different from ordinary cases where all those matters would be merged. They might have made a claim; that wouldn't defeat the judgment of the court rendered on March 2, 1918. That judgment is final. Nobody pretends it is wrong, nobody pretends there is anything the [20] matter with it and by that adjudication title of this property is in Edgar and Alfred Sadler and the other heirs signed away all interest they had by the stipulation, Exhibit C, and it expressly provided in that stipulation, Exhibit C, that they had no interest in this property. That being the situation, what value is it to the Court in this case to go into the talk and chatter that was had many years before. That stipulation is attached to plaintiff's complaint, your Honor, the original complaint, and that is signed by Louisa and Bertha Sadler and Edgar, Alfred R. and Clarence Sadler and Alfred R. Sadler is attorney in fact, and then it is signed by the brothers, or at least some of them. It seems as though Curler & Castle didn't sign here but the firm of Van Fleet and Henderson signed as attorneys for the Huntington & Diamond Valley Stock & Land Company. Now that stipulation contains what seems to me to be peculiarly powerful language. It is stipulated by all these parties, Clarence Sadler included, if his power of attorney means anything.

“1. That it be adjudged and decreed that the defendants, Edgar Sadler and Alfred Sadler, are the owners and entitled to the posses-

(Testimony of Edgar Sadler.)

sion of all the property described in plaintiff's complaint, which is situate in the County of Eureka, State of Nevada, and known as the Diamond Valley Ranch, a more particular description of said property to be inserted in said [21] decree, their title thereto quieted, and that none of the other parties * * *

That includes the plaintiff in this case:

"* * * none of the other parties to this action have any right, title or estate in said property, or any part thereof.

"2. That the plaintiff be adjudged the owner and entitled to the possession of all the rest of the lands and premises described in plaintiff's complaint, its title thereto quieted, and that none of the other parties to this action have any right, title or estate in said property, or any part thereof."

That would include Alfred and Edgar Sadler.

"3. That the defendants take nothing by their several counter-claims."

One of those counter-claims, I presume, is the complaint and the joint answer represented by Exhibit 1.

"4. That the money to be paid by the said Edgar Sadler and Alfred Sadler to the plaintiff as a consideration for this settlement and decree, shall be solely the obligation of said Edgar Sadler and Alfred Sadler, and that none of the parties hereto shall be in any wise personally liable therefor."

(Testimony of Edgar Sadler.)

That seems to be a clause that probably was suggested by the heirs or children or Reinhold Sadler. They wanted to be as [22] far removed from any liability, as completely free of any claim of interest, as language could possibly make them. Now, having signed that stipulation and decree, having entered upon it, that decree settling the question of ownership, of what use and aid is it to the Court to go back six or twelve years, or any number of years, to find out what John Smith claimed and John Jones denied.

The Court: If that is true, why do you deny ownership of this land in Reinhold Sadler at the time of his death?

Mr. Cooke: If what is true?

The Court: If you go back beyond 1918?

Mr. Cooke: I had to meet their allegation. They made the allegation in paragraph 2. That is why I had to do it.

The Court: That is one of the issues in this case and it may be a new principle. Is it the intention of counsel for the plaintiff to offer this power of attorney to meet in some degree the required proof of ownership of Reinhold Sadler in this property at the time of his death?

Mr. Cooke: We insist that the case must be decided upon the conditions as they were made to exist by that final decree and not prior to that time. The reason for the ownership [23] to Reinhold Sadler in 1906, your Honor, is readily explainable on another theory and that is that Exhibit "L"

(Testimony of Edgar Sadler.)

which, as put forth here as a trust agreement, provides for a division according to the will of Reinhold Sadler, so you would have to go back to that time. Of course, it raises also the question of whether there is any consideration for this trust agreement, but the claims and counter-claims and cross-claims of the parties with reference to this property, I think is merged in the decree to quiet title.

The Court: Objection will be overruled and Exhibit 2 for identification admitted in evidence as Plaintiff's Exhibit 2.

Mr. Thompson: Reading from Plaintiff's Exhibit2:

“Know All Men By These Presents: That Edgar Sadler of Eureka, Eureka County, State of Nevada, by these presents appoints Alfred R. Sadler, as Trustee, a Resident of Reno, Washoe County, State of Nevada, attorney in fact, for him and in his name, and for his use and benefit in all matters pertaining to his interest as an heir at law of the estate of R. Sadler, deceased, in general, and more particularly in reference to lands which the Huntington and Diamond Valley Stock and Land Company, a supposed California Corporation, holds under trust; the lands are situated in White Pine, Elko and Eureka Counties, State of Nevada.”

Q. I show you Plaintiff's Exhibit 3 for identification, Mr. Sadler, and ask you if you did not file

(Testimony of Edgar Sadler.)

that for record with the County Recorder of Eureka County, Nevada, on December 30, 1912?

A. Well, I don't know whether I did or not.

Mr. Cooke: Doesn't it show on the face, Mr. Thompson?

Mr. Thompson: It shows as follows: "Filed for Record at the Request of Edgar Sadler Dec. 30 A. D. 1912 at 15 min. past 7 o'clock a.m., and Recorded in Book A of Powers of Attorney, page 431 Eureka County Records. Edgar Eather Recorder," and if necessary we can have Supreme Court Justice Eather over here.

The Court: I don't think that is necessary. I think that is evidence itself.

Mr. Cooke: This is the official statement of the recorder?

Mr. Thompson: Yes. We offer Exhibit 3 in evidence, your Honor.

Mr. Cooke: If the Court please, this document seems to be a companion piece to Exhibit 2 and more or less identical.

Mr. Thompson: That one is signed by Clarence Sadler, Mr. Cooke, and not by Edgar.

Mr. Cooke: Oh yes, I see.

Mr. Thompson: We offer it, your Honor, for the purpose of showing that the family and heirs of Reinhold Sadler [25] were acting together as heirs with reference to this property.

Mr. Cooke: We object to it on the ground it is not admissible even for the purpose named by counsel, that it simply shows a transaction between

(Testimony of Edgar Sadler.)

Clarence Sadler and Alfred Sadler and is not joined in by any of the heirs; that it is hearsay as to the defendant, Edgar Sadler, and it is irrelevant and incompetent for any purpose whatever. It purports to be power of attorney from Clarence Sadler to Alfred to recover his interest in reference to land held under trust by the Huntington Land & Stock Company situated in White Pine, Elko and Eureka Counties and the balance of the form as found in the other one, but the point we make, your Honor, in this statement of Clarence Sadler in 1912 he had some interest in that ranch wouldn't tend to establish that he had an interest in it after March 2, 1918, or at any time, so far as that is concerned. It is not evidence against Edgar Sadler, wouldn't be evidence against Edgar Sadler if suit were brought immediate to the making of that document and quiet title in 1918 any more than if Edgar Sadler had gone up and down the streets in Eureka and proclaimed he was an interested party in that ranch.

The Court: I think it is admissible for the purposes stated by Mr. Thompson and especially so in connection with Exhibit 2. It is of like nature.

Mr. Thompson: I wish to call your Honor's attention to the fact that both were filed by Edgar Sadler at the same time, according to the endorsement.

The Court: They seem to have some connection, so that will be admitted in evidence as Plaintiff's Exhibit 3.

(Testimony of Edgar Sadler.)

Mr. Cooke: I expect it may be understood that all the rulings may be excepted to.

Mr. Thompson: I don't believe exception is necessary.

The Court: If it is, we can agree that counsel on both sides may have exceptions to any rulings of the Court.

Mr. Thompson: We so stipulate, your Honor.

Q. Who is Edgar Lane Plummer, Mr. Sadler?

A. He is a nephew of mine.

Q. He is the son of Wilhelmina Sadler Plummer, your deceased sister? A. Yes.

Mr. Thompson: I will offer in evidence next exhibit for identification. It is power of attorney, similar to the ones already in evidence, the endorsement showing that they were recorded by Edgar Sadler at the same time, this exhibit being signed by B. L. Plummer, as father and guardian of Edgar Lane Plummer. [27]

Mr. Cooke: We enter the same objection as to the other, on the ground that it is irrelevant and incompetent in that it is merely a statement in the nature of a power of attorney from one B. L. Plummer, described as being a guardian of Edgar Lane Plummer, a minor, of Eureka County, Nevada, appointing Alfred R. Sadler as trustee, a resident of Reno, Washoe County, State of Nevada, attorney in fact, for him and in his name and for his use and benefit and refers to his claims to the Diamond Valley Stock & Land Company Ranch and other property. The only connection that Edgar Sadler

(Testimony of Edgar Sadler.)

has with the document apparently is the fact that it was filed for record at his request. That, of itself, we submit, does not legally connect him with the document because a person can act as a mere messenger, such as attorneys frequently do or others, who carry papers in and they are filed with the recorder and the recorder marks on the outside that they were filed at the request of the party who handed them in, which is doubtless the usual practice and we make no complaint about that, but that does not make the contents of the document evidence against the party. I suppose your Honor in your practice, and I know I have and every attorney I guess, had occasion to file documents with the recorder that they did not know what the contents were. They are not chargeable as evidence against them 20 years later or at any time. That is all we have here. There is nothing to show that Edgar Sadler knew anything about the contents of the document and therefore we say it is hearsay as to the defendant. We repeat here the same objections that we have made to the previous offers. All of the claims of these parties, whatever they may have been, good, bad or indifferent, have been merged in the quiet title decree which adjudicated, upon the stipulation of all of these parties, that the title to this property on March 2, 1918, was exclusively in Alfred R. Sadler and Edgar A. Sadler, free and clear of any claim of any of these parties that are connected with these powers of attorney that we have been having here.

(Testimony of Edgar Sadler.)

The Court: The objection will be overruled and the exhibit is admitted in evidence as Plaintiff's Exhibit 4.

Q. Mr. Sadler, I show you Plaintiff's Exhibit 1, which is the answer in the quiet title suit that was brought in Elko County, and in order to refresh your recollection call your attention to the fact that the answer filed on behalf of you and your brothers, Alfred and Clarence, and your mother, was signed by Curler and Castle and Cheney, Downer, Price & Hawkins. Now isn't it true that at that time those two law firms represented you defendants in that case?

A. Yes, I guess it is.

Q. Alfred Sadler was living in Reno at that time, was he not, and he dealt principally with Cheney, Downer, Price & Hawkins?

A. Yes. [29]

Q. And you were living on the ranch in Eureka County and you would make trips into Elko to confer with the firm of Curler & Castle, is that true?

A. Yes.

Q. Now the question of the settlement of the quiet title suit brought by the Huntington & Diamond Valley Land & Stock Company against you and members of your family came up in the latter part of 1917 and early in 1918, did it not?

A. I think so.

Q. And at that time did you not have occasion to make several trips to Elko to confer with the attorneys, Curler & Castle, regarding it?

A. No.

(Testimony of Edgar Sadler.)

Q. You did not? You stayed at the ranch in Eureka, is that right?

A. Most of the time. I went there a few times.

Q. With regard to the settlement of the quiet title case?

A. Well, it never amounted to anything.

Q. Well, the case was settled, wasn't it?

A. No, I never went afterwards.

Q. Before March 2, 1918, when a decree was entered, you did confer with your attorneys?

A. Yes, I came to Reno.

Q. And also in Elko? A. Yes. [30]

Q. I show you Plaintiff's Exhibit No. 5 for identification, which purports to be a letter dated Diamond Valley December 30, 1917. In whose handwriting is that letter? A. Mine.

Mr. Thompson: I offer the letter in evidence, your Honor.

Mr. Cook: Do you mind stating who this is supposed to be to? It says, "Dear Brother."

Mr. Thompson: It is supposed to be to Alfred.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of the letter identified by the witness and counsel's statement it is addressed to his brother Alfred Sadler, dated December 30, 1917, being marked Exhibit 5 for identification, on the ground that it is irrelevant and immaterial and does not constitute any evidence or does not prove or tend to prove any issue in the case. It merely encumbers the records of the court. It is a letter, generally speaking, mentions the suit

(Testimony of Edgar Sadler.)

that they had before Judge Breen with the jury of six and six and then the question of some leases that seems to have been paramount in their minds when he wrote the letter, talking about some leases, and then he wants to arrange so Cheney won't have to go out there to get Curler at Elko because that is less expensive. That is about all there is to that. I would like the record to show also that I make the same objection as to previous offers, that all [31] those matters are merged in the decree of 1918.

The Court: Objection overruled and exhibit admitted in evidence as Plaintiff's Exhibit 5.

PLAINTIFF'S EXHIBIT No. 5

Diamond Valley,

Dec. 30, 1917.

Dear Brother:

Received the gum and other thing all right and much oblg for same. Been busy. Going to town on a suit Domingo Rectune had with Sara. A trespass on the water of Vienna Creek and jury did no agree—6 & 6, under Breen. Instructions to jury he said the Deed to the Company was first and the leases did not Count and would not let my lease go as he I had not the right to lease with out a order from Court and the waterright and land belong to Company and not to the R. Sadler estate. So I do not know what they will do about it as it look thing are getting worse all the time. Had a letter from Cheney saying the other side, want to throw out

(Testimony of Edgar Sadler.)

the Counter Claim and I might have to go to Elko again as Curler is going to attend to it so there will not be so much expenses for us. As it takes lots of money to go and come on these suits now there going to be a suit for possesoun. But do not know where it will come off. Will write you again with a Happy New Year and hope thing will turn out all right.

Your Brother,
/s/ EDGAR.

[Endorsed]: Filed Oct. 14, 1946.

Q. I call your attention to the signature of Edgar on the back side of Exhibit 5, Mr. Sadler, is that your signature? A. That's mine.

Q. And this letter was written by you to your brother Alfred Sadler, was it not?

A. Yes, it was.

Q. I show you Plaintiff's Exhibit 6 for identification, which purports to be a letter dated at the Diamond Ranch January 16, 1918, addressed as "Dear Brother," in whose handwriting is that letter? A. This is mine.

Q. And the signature, "Edgar Sadler" at the bottom of the letter is your signature?

A. Yes.

Mr. Thompson: I offer the letter in evidence, your Honor, as Plaintiff's Exhibit 6.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of Exhibit 6 for

identification, on the ground that it is merely a statement from him to his brother, Alfred Sadler, in regard to some trespass suit and also in regard to consulting Judge Curler as to the counter-claims in the quiet title suit and in reference to his idea that it [32] would be better for them to buy this ranch, he and Alfred to buy the ranch for \$15,000 than it would be to go on with it and suggests he see Henderson and see what can be done. That is Henderson, attorney for the plaintiff. That is the gist of the letter and it contains nothing that would constitute any evidence in this case that he, Clarence Sadler, had any interest whatever in the ranch. It is a communication, so far as this purchase is concerned, from Edgar to Alfred Sadler that they buy the ranch. The ranch was bought by them and in their joint names, so that what may have been said or done between them, it seems to me it is no evidence whatever as to Clarence Sadler or the other heirs, unless they are mentioned, and they are not mentioned in any of these exhibits so far. We make the same objection here as we made to the other exhibits, that it preceded the final complete settlement of March 2, 1918, in which the stipulation settled the rights of everybody, and the decree that was entered pursuant to the stipulation, and that we are all foreclosed and precluded from going back of that, it not being material in any way.

Mr. Thompson: I might state the way you have explained that exhibit I should think you have no objection to its admissibility.

(Testimony of Edgar Sadler.)

Mr. Cooke: I don't want to butcher the paper in evidence.

The Court: The objection will be overruled and the [33] exhibit admitted in evidence as Plaintiff's Exhibit 6.

PLAINTIFF'S EXHIBIT No. 6

Diamond Ranch,

Jan. 16, 1918

Dear Brother:

I was up in Elko last week as Judge Curler sent for me to come up to fix some paper and keep me 4 day and did not fix any as he had to have another talk with Cheney about the brief he put in and they are going to talk on demurrer on the Counter Claims put in and will have to go up on Friday again. I think if we could get them to settle it would be better for us if we could do so. If we gave them \$15,000 we could sell the Henderson Ranch and get half, and mortgage the ranch for about \$8,000 and be through as it will cost us a lot of money to fight them as they have all the papers. Will talk to Curler about it when I go up again. Now Kimball and Sara wants us to fight the suit they have with Domingo and that will take more money. So I am going to see what Curler & Castle can do with Herman. If we have to lose some money we are out and be done with it as the ranch is good for what we borrow on it till we pay it back. So write me to Elko by return mail what

(Testimony of Edgar Sadler.)

you think of it. Had a little snow up this way. Mining is on the bum up here. The companys ??? can not pay their men off and have shut down now. Address letter to Mayer Hotel Elko for I will be there till Sunday.

Your Brother,

/s/ EDGAR SADLER.

[Endorsed]: Filed Oct. 14, 1946.

Q. Mr. Sadler, Exhibit 6 is a letter which you wrote to your brother, Alfred Sadler, on January 16, 1918, is it not? A. Yes.

Q. I call your attention to the fact that in the letter you state as follows: "I think if we could get them to settle it would be better for us if we could do so. If we gave them \$15,000 we could sell the Henderson ranch and get half and mortgage the ranch for about \$8000 and be through as it will cost us a lot of money to fight them as they have all the papers. Will talk to Curler about it when I go up again. Now Kimball & Sard wants us to fight the suit they have with Domingo and that will take more money. So I am going to see what Curler & Castle can do with Herman." Herman Sadler was your father's brother, was he not?

A. No.

Q. Who is Herman Sadler?

A. A cousin of mine.

Q. And he was the principal party involved on behalf of the Huntington & Diamond Valley Land & Stock Company? A. He seems to be.

(Testimony of Edgar Sadler.)

Q. He represented it in the quiet title suit?

A. Yes.

Q. What was his full name? [34]

A. Herman J. Sadler.

Mr. Thompson (continues reading): "If we have to lose some money we are out and be done with it, as the ranch is good for what we borrow on it till we pay it back, so write me to Elko by return mail what you think of it. Had a little snow up this way. Mining is on the bum up here. The companies can not pay their men off and have shut down now. Address letter to Mayer Hotel Elko for I will be there till Sunday."

Q. I show you Plaintiff's Exhibit 7, Mr. Sadler, which purports to be a letter on the stationery of the Hotel Mayer, Elko, Nevada, addressed "Dear Alfred," in whose handwriting is that?

A. That's my handwriting.

Q. And the signature on the second page of the letter is your signature, Edgar? A. Yes.

A. Mr. Thompson: I offer the letter in evidence, your Honor. We intend to fix the date by reference to the exhibit just admitted which stated that the witness, Edgar Sadler, would be at the Hotel Mayer, and also by the subject matter of the letter. We do not have the exact date, but the approximate date.

Mr. Cooke: What do you call approximate date?

Mr. Thompson: The preceding letter was dated January [35] 16, 1918 and he said he would be at the hotel there for the next few days.

Mr. Cooke: Well, I would like to have that date

(Testimony of Edgar Sadler.)

fixed, because he could have been at the Hotel Mayer a hundred times after that, but we don't make any point on that, your Honor. We do object to it on the ground it is irrelevant and immaterial and does not tend to show that Clarence Sadler had any interest whatever in this property. It is simply a letter between Alfred and Edgar Sadler in regard to the desirability of their raising \$15,000 to get this ranch and settle the litigation. That is all it purports to be. And we make the same objection, that all these transactions before the decree and stipulation of 1918 are merged in that decree and hence they are irrelevant and immaterial.

The Court: Same ruling.

Mr. Thompson: On thing I would like to point out, your Honor, under the power of attorney in evidence, that Alfred Sadler was representing Clarence Sadler as attorney at that time, as attorney in fact.

The Court: Admitted in evidence as Plaintiff's Exhibit 7.

[Letterhead Hotel Mayer, Elko, Nevada]

PLAINTIFF'S EXHIBIT NO. 7

Dear Alfred:

Drop you line today, as we have agreed to pay them \$15,000 taken Diamond Ranch. Now we will have to get Bertha and mother to sign deed to that

(Testimony of Edgar Sadler.)

effect, that they get a clear title he does not want anything that does not belong to the Company. Will be in Reno. as soon as I can get home and fix up thing up so as I can come down and then we will take Cheney up to Carson and get it done right. So expect me any time.

Your Brother,

/s/ EDGAR.

[Endorsed]: Filed Oct. 14, 1946.

Mr. Cooke: We deny that there is anything in there to show that he was acting as attorney in fact.

The Court: We will take our recess now until two o'clock.

(Recess taken at 12:00 o'clock.)

Afternoon Session—October 14, 1946

3:00 P.M.

MR. EDGAR SADLER

resumed the witness stand on further examination by Mr. Thompson.

The Court: You may proceed, Mr. Thompson.

Mr. Thompson: At the time of the recess, your Honor, Exhibit 7 had just been admitted in evidence.

Q. Mr. Sadler, Exhibit 7 is a letter written by you to your brother, Alfred Sadler, is it not?

A. Yes.

(Testimony of Edgar Sadler.)

Q. And your brother Alfred was in Reno, Nevada at that time? A. Yes.

Mr. Thompson: The letter is on the stationery of Hotel Mayer, Eureka, and reads:

“Dear Alfred. Drop you line today as we have agreed to pay them \$15000 taken Diamond Ranch * * *.”

By that did you mean that you had agreed to pay the Huntington & Diamond Valley Stock & Land Company \$15,000? A. Yes.

Q. And that you were taking the Diamond Ranch, is that correct? A. Yes.

Mr. Thompson (Continues reading): “Now, we will have to get Bertha and mother to sign deed to that effect, that they get a clear title.” [37]

Q. By that, “they get a clear title,” did you refer to the Huntington & Diamond Valley Stock & Land Company?

Mr. Cooke: May the objection we have heretofore made about Alfred Sadler to Exhibits 7, 6, 5, 4, and 3 that these negotiations were preceding that decree made March 2, 1918, and are merged in that decree, may that be deemed to go to all this same type of testimony? You are now cross-examining on the contents and we want the objection to apply to that.

The Court: It may be so understood. The objection will be overruled.

Q. Where you say that they get a clear title, to whom do you refer by the word “they?”

A. That means Alfred and I.

(Testimony of Edgar Sadler.)

Q. That you get a clear title? A. Yes.

Q. Now it says: "He does not want anything * * *," who is "he?" "He does not want anything that does not belong to the company." Weren't you referring to Herman J. Sadler?

A. I think so.

Q. "* * * that doesn't belong to the company"; by "company" do you refer to the Huntington & Diamond Valley Land & Stock Company?

A. Yes, that's right.

Q. The balance of the letter states: "Will be in Reno as [38] soon as I can get home and fix up things up so as I can come down and then we will take Cheney up to Carson and get it done right, so expect me any time. Your Brother Edgar." Now at that time your mother, Louisa Sadler, and your sister, Bertha Sadler, were living in Carson City, Nevada, were they not? A. Yes.

Q. Now do you recall, Mr. Sadler, that on March 2, 1918, the decree was entered in the quiet title suit at Elko? You recall that, do you not?

A. Yes.

Q. And you also understand that the plaintiff, Clarence Sadler, has alleged in his complaint that a written agreement made in March 2, 1918, was signed by yourself and by Alfred Sadler and that a copy of that agreement was attached to the complaint, do you recall that?

Mr. Cooke: What complaint?

Mr. Thompson: Our complaint in this case.

Mr. Cooke: You are asking about the agreement. Let counsel show the witness what he is interrogating him about.

(Question read.)

Q. —in this case.

The Court: He can answer that question. Objection will be overruled. Do you understand the question, Mr. Sadler? [39]

A. After this suit was started?

Q. Yes. Could I have the complaint, your Honor?

The Court: Yes.

Q. Now I am asking you, Mr. Sadler—this is complaint filed in this case by Clarence Sadler against you and in the complaint Clarence Sadler has alleged that you and Alfred signed Exhibit "L" attached to the complaint, which is an agreement dated March 2, 1918. You understand that?

A. Yes.

Q. What that agreement is. You have seen it, I assume, in Mr. Cooke's office? A. Yes.

Mr. Cooke: That isn't correct. He hasn't seen the agreement.

Q. You have seen the complaint?

Mr. Cooke: Seen a photostatic copy.

Q. You have also seen photostatic copy of the agreement which I furnished to Mr. Cooke at his request? A. Yes.

Q. In your answer filed in this case, Mr. Sadler, Paragraph 6, line 30, page 2, and lines 1, 2, and 3 of page 3 of the answer you said: "The defendant

(Testimony of Edgar Sadler.)

denies that thereafter, or at all, a written memorandum of said alleged trust agreement was executed by the said Edgar A. Sadler as alleged, or at all." Now that refers to Exhibit "L" that I just showed you. [40] Now at this time do you deny that you signed such an agreement?

A. Never signed anything.

Q. And you deny that you signed the agreement, a copy of which is attached as Exhibit "L" to the complaint?

A. Never signed nothing.

Q. You deny that you signed that agreement?

A. Yes.

Mr. Cooke: I must insist that you show him the agreement.

Q. I show you Plaintiff's Exhibit 8 for identification——

A. That is the same one that I said I didn't sign at all. I didn't know nothing about that. I haven't seen anything like that until I come up here, until Mr. Cooke sent it to me; I never seen it at all.

Q. You have never seen Exhibit 8 before?

A. No.

Q. I call your attention to the signature, "Edgar Sadler," at the bottom of Exhibit 8. Is that your signature?

A. It might be and it might not.

Q. Did you write "Edgar Sadler" at the bottom of Exhibit 8?

A. I don't know whether I did or not.

Q. Will you testify definitely that you never saw this before?

(Testimony of Edgar Sadler.)

A. No, I never seen that before.

Q. Did you write "Edgar Sadler" at the bottom of that agreement? A. No. [41]

Q. Mr. Sadler, I show you Plaintiff's Exhibit 9 for identification, which purports to be a power of attorney signed by you directed to Alfred R. Sadler as your attorney in fact, acknowledged December 26, 1924, before R. McCharles, county clerk and filed for record at the request of Alfred R. Sadler by C. F. Riley, recorder. Is the signature at the bottom of that power of attorney your signature?

A. Yes.

Mr. Thompson: I offer Exhibit 9 for identification in evidence, your Honor. Offer it as a handwriting exemplar.

Mr. Cooke: As long as it is limited solely to being an exemplar of handwriting it may be admitted in evidence. No objection to that.

The Court: That is one objection I would have sustained if you had made one. I can't see the purpose of it.

Mr. Thompson: It is a handwriting exemplar, your Honor, to use as comparison.

The Court: You haven't offered any exhibit yet.

Mr. Thompson: I can't offer it yet, your Honor, it hasn't been proved.

The Court: Exhibit 8?

Mr. Thompson: Yes.

Mr. Cooke: I have no objection for the purposes stated.

The Court: It may be admitted in evidence as Exhibit 9. [42]

(Testimony of Edgar Sadler.)

PLAINTIFF'S EXHIBIT No. 9

Know All Men by These Presents:

That I, Edgar Sadler, for myself and as a lawful heir of Reinhold Sadler; Louisa Sadler and Bertha Sadler, all Deceased, a resident of Eureka, Eureka County, State of Nevada, have made, constituted and appointed, and by these presents do make, constitute and appoint Alfred R. Sadler, a resident of Reno, Washoe Co., Nevada, my true and lawful attorney, agent and my attorney in fact, for me and in my name, place and stead and for myself use and benefit, to ask, demand, sue for recover sue for, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands, whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me from said estates and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof by attachment, arrest or otherwise, and to compromise and agree for the same, and discharges for the same. for me and in my name, to make and deliver; contract for, purchase, receive and take lands, tenements, hereditaments, and accept the seisin and possession of all lands, and all deeds and other assurances in the law therefor, and to lease, let, sell release, convey, mortgage and hypothecate, lands, tenements and hereditaments upon such terms and conditions, and under such covenants as he shall think fit. Also to bargain for, buy, sell, mortgage, hypothecate, and in

(Testimony of Edgar Sadler.)

any and every way and manner, deal in and with goods, wares and merchandise, choses in action and other property in possession or in action, and to do every kind of business of what nature or kind soever, and also for me and in my name, and as I myself would act and deed to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgments and other debts, and such other instruments in writing of whatever kind and nature as may be necessary. That said Alfred R. Sadler be allowed to serve without bonds in regard to settlement of said estates of Reinhold Sadler, Louisa Sadler and Bertha Sadler, all Deceased. [69]

Giving, unto Alfred R. Sadler said attorney full power to perform every act and thing which he may think necessary to be done in and about the estates, as fully to all intents and purposes as I might or could do if personally present hereby ratifying and confirming all that Alfred R. Sadler, said Attorney, shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand the day of one thousand nine hundred and

Signed and Delivered in the Presence of

/s/ EDGAR SADLER.

[Seal]

/s/ R. McCHARLES,

(Testimony of Edgar Sadler.)

State of Nevada,
County of Eureka—ss.

On this 26 day of July, A.D. 1924, personally appeared before me, R. McCharles, County Clerk, and ex-officio Clerk of the Third Judicial District Court of Nevada, in and for said County, Edgar Sadler, known to me to be the person described in and who executed the annexed instrument, who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand officially and affixed the Seal of the said District Court, the day and year in this certificate first above written.

[Seal] /s/ R. McCHARLES,
County Clerk and ex-officio Clerk of the Said Third
Judicial District Court, Eureka County.

By
Deputy.

Pd. 2.45

Power of Attorney from Edgar Sadler to Alfred R. Sadler. Dated, A.D. 19....

Filed for Record at the Request of Alfred R. Sadler, Mar. 24, A.D. 1925, at 12 min. past 10 o'clock

(Testimony of Edgar Sadler.)

a.m., and Recorded in Book of Powers of Attorney Plats & Misc., Page 363.

.....,

County Records.

/s/ C. F. RILEY,

Recorder.

By,

Deputy Recorder.

File No. 55

Filing for record.....	.25
2 indexing at 50c.....	1.00
4 folios at 30c.....	1.20

\$2.45

[Endorsed]: Filed Oct. 14, 1946.

Q. Mr. Sadler, I show you Exhibit 10 for identification, which is a check dated February 21, 1923, payable to Edgar Sadler in the sum of \$100, signed Alfred R. Sadler, bears the endorsement, "Edgar Sadler." Is the endorsement on that check, "Edgar Sadler," your signature? A. Yes.

Mr. Thompson: I offer Exhibit 10 in evidence, your Honor, as a handwriting exemplar.

Mr. Cooke: For that purpose only?

Mr. Thompson: Yes.

The Court: It may be admitted for that purpose.

(Testimony of Edgar Sadler.)

Q. I show you another check, Mr. Sadler, Exhibit 11 for identification, which bears the endorsement, "Pay to the order of the Washoe County Bank. Edgar Sadler," is the endorsement in your handwriting? A. Yes.

Q. Yes? A. Yes, sure.

Mr. Thompson: I offer Exhibit 11 for identification in evidence.

Mr. Cooke: That is offered for the same purpose?

Mr. Thompson: Yes.

Mr. Cooke: No objection.

The Court: Admitted in evidence. [43]

Q. I show you Plaintiff's Exhibit 12 for identification, Mr. Sadler, another check dated January 28, 1925, bears the endorsement "Pay to the order of the Washoe County Bank Edgar Sadler," is the endorsement on that check in your handwriting?

A. Yes, that's mine.

Mr. Thompson: I offer Exhibit 12 for identification in evidence, your Honor, as a handwriting exemplar.

Mr. Cooke: For that purpose only?

Mr. Thompson: Yes.

Mr. Cooke: No objection.

The Court: It may be admitted in evidence as Exhibit 12.

Q. I show you Exhibit 13 for identification, Mr. Sadler, which is another check to your order, dated June 29, 1923, bears the endorsement, "Pay to the

(Testimony of Edgar Sadler.)

order of the Washoe County Bank. Edgar Sadler," is the endorsement on that check in your handwriting? A. Yes.

Mr. Thompson: I offer Exhibit 13 for identification in evidence as a handwriting exemplar.

Mr. Cooke: On the same condition as the others?

Mr. Thompson: That is the only purpose.

Mr. Cooke: No objection.

The Court: Exhibit 13 may be admitted in evidence.

Q. I show you Exhibit 14 for identification, Mr. Sadler, which [44] purports to be a letter dated at Eureka, Nevada, April 18, 1923, addressed "Dear Alfred," in whose handwriting is that letter?

Mr. Cooke: If you know.

A. Oh, that's my writing.

Q. Is the signature, "Edgar Sadler," your signature? A. Yes.

Q. Written by you? A. Yes.

Mr. Thompson: I offer Exhibit 14 for identification in evidence.

Mr. Cooke: Same purpose?

Mr. Thompson: As a handwriting exemplar and also for any other materiality it may have. It is a letter to Alfred Sadler, refers to the ranching business and borrowed some money.

Mr. Cooke: The offer is objected to as being irrelevant and incompetent on the questions in this case. It is a business communication between one co-tenant and the other co-tenant, purporting to be grantees in the deed of the decree of March 2,

(Testimony of Edgar Sadler.)

1918, and that it does not contain anything that would throw any light upon the claims of the plaintiff in this case as being interested in the property mentioned in the letter or in the property described in the complaint involved in this case. [45]

The Court: Objection will be overruled and the exhibit admitted in evidence as Exhibit 14.

PLAINTIFF'S EXHIBIT No. 14

Eureka, Nevada

Apr. 8, 1923

Dear Alfred:

Drop you a line today as I told the parties about the house and he said he would take it and deposit a \$100 down and as soon as he got off the Jury would fix the other up. Now I want you to go to the Bank and ask them to give us a little more time till this fall so I can sell some of the cattle off as will have to sell about \$4,000 or \$6,000 off. As money is hard to get in the spring but will send them \$1700.00 as soon as I get the house business fix up. So do that and see that they say and let me know.

Your Brother,

/s/ EDGAR SADLER.

[Endorsed]: Filed Oct. 14, 1946.

Mr. Thompson: We have a witness here from Berkeley, your Honor, and at this time, with the Court's permission, we would like to interrupt the cross-examination of Mr. Sadler as an adverse party and put that witness on.

Mr. Cooke: No objection.

The Court: You may do so.

DR. PAUL F. KIRK

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Paul F. Kirk.

Q. Where do you live, Mr. Kirk?

A. Berkeley, California.

Q. What is your profession?

A. Professor of bio-chemistry, University of California; professor in criminology at the same institution.

Q. What is your education in that field?

A. I have taken three degrees, bachelor's degree at Ohio State University in chemistry, Master's Degree at the University of Pittsburgh, likewise in chemistry, and Doctor of Philosophy at the University of California in bio-chemistry.

Q. How long have you been employed at the University of California [46] at Berkeley, California, as a professor?

(Testimony of Dr. Paul F. Kirk.)

A. I have been employed there continuously since 1925 with the exception of three of the war years and for a period since 1935 in teaching of criminology and testing of physical evidence.

Q. What fields of criminology have you been teaching at the University?

A. I teach primarily microscopy and its application in the study of physical evidence, including documents and other matters similar to that which includes physiological fluids and other things.

Q. In the course of your work do you engage in handling comparisons? A. I do.

Q. And also do you examine documents for the purpose of determining whether the handwriting of signatures on them are forged or genuine?

A. I do.

Q. How long have you been engaged in that type of work? A. Since about 1935.

Q. Have you ever qualified as an expert witness on the question of documents and in the comparison of handwriting in courts of general jurisdiction in the United States?

A. I have qualified in both federal and State courts and in the examination of documents. [47]

Q. And during the past year, for example, how frequently have you been called as an expert witness to testify with regard to such matters?

A. I imagine approximately a dozen times, that is, on documents. More than that on other material, other matters.

(Testimony of Dr. Paul F. Kirk.)

Q. Did Mr. Clarence Sadler and myself meet you in Berkeley, California, in July of this year?

A. You did, on July 17th.

Q. I show you Plaintiff's Exhibit 8 for identification, Plaintiff's Exhibit 2, Plaintiff's Exhibit 9, Plaintiff's Exhibit 5, Plaintiff's Exhibit 6, Plaintiff's Exhibit 7 and Plaintiff's Exhibit 13, Plaintiff's Exhibit 12, Plaintiff's Exhibit 11, and Plaintiff's Exhibit 10. Have you seen those before Dr. Kirk?

A. I have examined these documents.

Q. Where did you examine them?

A. My laboratory at Berkeley.

Q. That was July of this year?

A. July of this year, that is correct.

Q. Did you cause photographs to be made of the signatures on those several exhibits which I specified?

A. I did.

Q. Do you have those with you?

A. I have. The top photograph is that of the questioned document, the agreement of March 2, 1918. [48]

Q. The top signature there is a photograph of the signature of Plaintiff's Exhibit 8 for identification, is that correct?

A. That is correct. The other 10 are the exemplars which are on the desk before me. I will identify each of them individually. The top exemplar is a letter Eureka, Nevada—that letter does not seem to be here.

Q. I show you Plaintiff's Exhibit 14, is that also one of the documents you examined at Berkeley?

(Testimony of Dr. Paul F. Kirk.)

A. That is correct. That is the one from which the signature is reproduced on top for exemplar signatures.

Q. There is a label E-3 on that exemplar.

A. The next one down is letter with the Diamond Ranch heading of January 16, 1918. It is Exhibit No. 6. The third one down——

Q. Just a moment. Exhibit 6 is labeled E-4 on the photograph enlargement of the signature?

A. That is correct. The third one down is the letter, Plaintiff's Exhibit No. 5 and it is labeled E-6 on the photograph. The fourth one down is power of attorney, 1912, which is Plaintiff's Exhibit No. 2. The fifth one is power of—I am mistaken on that—the third one is power of attorney——

Q. Will you refer to it by the label number?

A. Yes. E-6 is Plaintiff's Exhibit No. 9. E-7 is Plaintiff's Exhibit No. 2. E-8 is a check, Plaintiff's Exhibit No. 10. E-9 is a check, Plaintiff's Exhibit No. 13. E-10 is Plaintiff's [49] Exhibit 12. E-11 is Plaintiff's Exhibit 11. E-1, which is out of order because of the size of the signature, is Plaintiff's Exhibit No. 7, and E-5, which is also out of order because of its size, is Plaintiff's Exhibit No. 5. They are all complete.

Q. Dr. Kirk, Plaintiff's Exhibit No. 15 for identification is a pasteboard card which bears photographic enlargements of the signature of Edgar Sadler, is that correct?

A. That is correct.

Q. And the numbers E-1-2-3, etc., which you used in your testimony, refer to stickers and the

(Testimony of Dr. Paul F. Kirk.)

numbers placed on the stickers on each one of the photographic enlargements of Exhibit 15 for identification? A. That is correct.

Mr. Thompson: I offer Exhibit 15 in evidence, your Honor.

Q. (By Mr. Cooke): You testified that you qualified as an expert witness, I think, in handwriting, I think, in some dozen cases?

A. Some dozen this year.

Mr. Thompson: If the Court please, I do not think I ask any question that calls for any voir dire examination at this time.

The Court: I think Mr. Cooke is entitled to ask such questions before this is admitted. [50]

Mr. Thompson: All right, your Honor.

Q. (Mr. Cooke): What was your answer?

A. I said the answer referred to this year.

Q. About a dozen this year?

A. Approximately a dozen this year; I don't know the exact number.

Q. What court or what State? Tell us what court it was that you qualified the last time.

A. The last time was the federal court in San Francisco. That was last week. I have qualified more commonly in Alameda County courts in Alameda County.

Q. What case in federal court? What was the title?

A. It was Hitchcock vs. Southern Pacific.

Q. Which side were you called on?

A. Southern Pacific.

(Testimony of Dr. Paul F. Kirk.)

Q. What was the result in that case?

A. I have not heard yet. It wasn't through when I was through testifying and I haven't had time to inquire.

Q. What about the case before that?

A. The case before that was in connection with a will, in which a woman was accused of forging a will.

Q. What was the title of the case if you recall?

A. It was *People vs.*—the name has slipped me and I can't think of the defendant's name.

Q. In the State court?

A. In the State court, yes, in Alameda County.

Q. Which side were you called on as witness there? A. Prosecution side.

Q. What was the result in that case?

A. The woman was convicted for forging the will.

Q. Where before that, where did you qualify as an expert in handwriting?

A. I can't recall the order of cases. I testified in a number of will cases in recent times. I testified for a number in which there were suits involving the Southern Pacific Company. I have handled their documents for a number of years, the key system likewise, but I don't recall the order of the cases.

Q. But tell us about the cases you do recall, whether given in regular order or not.

A. For example there was one case in which there was a woman, Mrs.—I can't remember the

(Testimony of Dr. Paul F. Kirk.)

name, my memory is very, very poor—is being sued for a bill, \$2500. In that case both her handwriting and the way in which certain writing was put on the document was involved. Her signature appeared under a promissory note that was typed on the bill and it was possible for me to show in that case that the typing had been placed there after the signature, so that she had not signed the promissory note.

Q. What was the title of that case, do you remember, Doctor?

A. That was somebody or other vs. Hilda Corlin Oschner. The plaintiff was a dentist whose name I have forgotten. That was [52] some years ago.

Q. What county?

A. Alameda Superior Court.

Q. Which side called you as a witness?

A. For the defense.

Q. What was the result?

A. We won the case. The decision was for the defense.

Q. For Mrs. Oschner? A. Yes.

Q. Are there any more cases you have in mind now?

A. Let us see—I was called in one in the federal court. I went in the court room. I didn't have to testify in that one—about a year ago. The Southern Pacific Company was defendant in the suit for damages, rather for back pay, and I was prepared to testify in that one but it wasn't necessary because the judge found for the Southern Pacific before it was necessary to testify.

(Testimony of Dr. Paul F. Kirk.)

Q. Did that involve forgery?

A. No, I was testifying on an anonymous letter in that case. I could have shown that the anonymous letter was written by the plaintiff in the action.

Q. About how many years does your experience extend over, when you first began?

A. More or less continuously since 1935.

Q. How old a man are you? [53]

A. I am 44.

Q. Was July 18th, when Mr. Clarence Sadler and Mr. Thompson contacted you in regard to this matter, was that the first knowledge you had of this matter?

A. On July 17th was the first knowledge I had with the case, yes.

Q. You hadn't discussed the matter with Mr. Clarence Sadler before that?

A. No, never met Mr. Clarence Sadler.

Q. You knew nothing about the case?

A. I didn't even after I talked to him. He merely asked me, "Is this signature genuine or not?"

Q. And they explained to you that signature was genuine?

A. No, they didn't explain. I didn't know whether they hoped it would be genuine or not genuine.

Q. Did you do the photographic work yourself or was that done by somebody else?

A. It was done under my direction and super-

(Testimony of Dr. Paul F. Kirk.)

vision but was done actually by another man who has better equipment than I had to do it. I was present when it was done.

Q. You had the original document, or purported to be the original document, did you not?

A. I had the same document which appeared on the table.

Q. This one here marked Plaintiff's Exhibit 8, I think, for identification? [54]

A. Correct.

Q. Was it necessary for you, or did you determine for yourself, who wrote the body of the document?

A. I wasn't asked to study that matter. However, I noted that it was written not by Edgar Sadler, but by Alfred.

Q. Apparently the body of it is in the handwriting of Alfred Sadler? A. Yes.

Q. You did not reach any conclusion, did you, Doctor, as to whether what you believe is the genuine signature of Edgar Sadler, whether that was put there at any particular time, either before or after the body of the document was written?

A. No, I reached no particular conclusion on that. The ink is rather old and it has darkened with age and the appearance of it is similar to the remainder of the document, not identical, similar, more heavy, but I am certain it is not a very recent signature, but I couldn't say how old it is.

Q. Is there anything in that document that would enable you to say whether or not the signa-

(Testimony of Dr. Paul F. Kirk.)

ture of Edgar Sadler is with the same ink as the signature of Alfred Sadler?

A. I did not study that question conclusively. It looks to be the same ink but I didn't apply a chemical test.

Q. That is blacker, isn't it, Doctor?

A. Yes, it is a little darker, a little more heavier written.

Q. In addition to being heavier written, isn't there something [55] about it that indicates the ink was blacker than the ink used in the signature of Edgar Sadler?

A. It could be blacker. Of course, that question doesn't seem to be pertinent, because it might have been signed with different ink or pen, even though it was signed at the same time.

Q. You were not requested to examine anything in regard to the document other than to determine from exemplars that were furnished to you whether, in your expert opinion, the name Edgar Sadler on this questioned document was, in your judgment, genuine or not?

A. That is correct. That is, whether it was the same person who wrote these others or not.

Q. That was the only thing you were requested to do?

A. The only thing I was requested to do.

Q. You have referred to some five or six or more exemplars that were handed to you as being the genuine signatures of Edgar Sadler and you have used those in connection with your work?

(Testimony of Dr. Paul F. Kirk.)

A. They were given to me as genuine signature. I have no knowledge.

Q. I understand. Did you get any other documents purporting to be genuine signatures of Edgar Sadler, other than those you used and testified to today?

A. I had one photographic copy of a document, I think it was [56] an agreement, and I examined that also, but the photograph was reduced considerably and it was not a very good photograph, so I did not copy it for this purpose. I did not see the original document, merely a photograph.

Q. Was that a one-page affair or two pages?

A. I do not recall now whether one or two. It was two, that's right.

Q. Do you recall any other signature on that document besides this Edgar Sadler?

A. No, I don't, at the time when I saw it.

Q. Was that the only reason you did not make an enlargement of that one?

A. The only reason, because it was a poor print. As a matter of fact the signature agrees with the others and with the questioned documents.

Q. Counsel has handed me a photostat of a letter. I will show it to you and ask you if that is the one that you refer to there?

A. Yes, that is the one. Note that signature, Edgar Sadler, the whole document, has been reduced and that signature is quite small and did not rephotograph comparatively well.

Mr. Thompson: Do you have any objection to this being admitted in evidence as a handwriting

(Testimony of Dr. Paul F. Kirk.)

exemplar? It is a photograph of the stipulation dated February 14, 1918, in the quiet title suit in Elko County. [57]

Mr. Cooke: No objection. The document itself is already before the court as part of the pleadings. If you want it in, I am perfectly willing. The witness may refer to it and identify it.

Mr. Thompson: I offer the photographic copy of the stipulation in evidence, your Honor, as Exhibit 16.

Mr. Cooke: No objection. I presume that is in connection with his testimony?

Mr. Thompson: The body of it has been admitted.

A. I wasn't asked whether I thought that signature was genuine. It may be an admission which should go in the record.

Mr. Thompson: I have not had a chance to question you yet, Doctor.

The Court: Admitted as Exhibit 16.

Q. (Mr. Cooke): Then aside from Exhibit 16 which you just saw, you have no other papers purporting to be exemplars of Mr. Edgar Sadler's signature, other than those you already mentioned?

A. I had no others except those, no. That is the entire list.

The Court: Exhibit 16 will be admitted in evidence.

Mr. Thompson: For the purposes of illustration, your Honor.

The Court: We will be in recess for about 10 minutes. [58]

4:10 P.M.

DR. KIRK

resumed the witness stand on further direct examination by Mr. Thompson.

Q. Dr. Kirk, referring to Exhibit 8, which is the questioned document, Exhibit 8 for identification, and Plaintiff's Exhibits Nos. 2, 5, 6, 7, 9, 10, 11, 12, 13 and 16, 16 being the photographic copy of the stipulation dated February 14, 1918, did you examine those for the purpose of forming an opinion as to whether the signature, Edgar Sadler, appearing on Exhibit 8 for identification was in the same handwriting as the signatures appearing on the other exhibits I have specified?

A. I did so examine it.

Q. What is your opinion?

A. I concluded that it unquestionably is written in the same hand as the exemplars believed to be genuine.

Q. Will you state on what facts appearing from those exhibits you base that opinion?

A. I base that opinion on a number of points of view. In the first place, where it is forged it would be either traced, drawn or written freely. Examination under the microscope of the line formation of the questioned signature shows it was written absolutely freely and with as much facility as the signatures in the exemplars. The only thing that might incline one to any opposite view would be a slight feathering of the ink on the "l," "e" and "r"

(Testimony of Dr. Kirk.)

at the end. Those letters [59] were particularly examined and evidently there was a little dirt on his pen because the nib strokes are particularly smooth and regular, so it was not traced or drawn, since tracing and drawing will invariably show hesitations and spaces, wobbles, wavers, etc. Then if it was written freely, the question is did the same letter form and some individual characteristics as the genuine writing, as shown in the exemplars, comparison of letter forms show any significance differences, because the questioned letters, or letters of the questioned signature, are bracketed completely by corresponding letters in the exemplars. In addition to that, the individual characteristics of the writer were apparently identical. The skill, speed, ease, etc., are about the same. I would say that the writer of these signatures was not a good penman. He was evidently a person who did not write a great deal or had not been thoroughly trained in writing, so that his writing is quite irregular and not very skilful. The significant points of the letter forms is a strong tendency toward pointing of hooks and loops, for instance, which is something the writer would not normally be conscious of, as shown very strongly in the "e," first capital "E." The lower hook is almost identical throughout, occasionally rounded, ordinarily tends to point. The "d" stroke up is quite characteristic. It is a strong stroke at an angle and you notice it throughout the exemplars and the questioned with [60] the exception of one or two. The E-7, which is the earliest exemplar I

(Testimony of Dr. Kirk.)

have, 1912, does not show it, but in general it is quite definite throughout. A strong tendency to loop shows in the questioned "d" and also in several other "ds," including 8, particularly 9, 10, and 11 and some of the d's in Sadler, also in Exhibit 9, E-7 and E-6.

Mr. Cooke: What is shown?

A. The looping of the "D," an insertion of a loop instead of retrace. The position of the "d" and "g," I think, is rather significant. The "d" somewhat overshadows the "g" in every case. They are also crowded together. That is a little idiocyncrasy of which the writer would not normally be aware. In general most of the letters are spaced rather widely apart, but the "D" and "g" are an exception and there is a tendency for the "l" and "e" in Sadler to be crowded. The "a's" are perhaps the most variable in the group. The "l," with only one exception, is a considerably taller loop than the "d" loop, quite noticeable in the questioned and all but in one exemplar and this is the one in which the pen wasn't working well, which is E-11. Even the terminals are about as nearly alike as you could expect to get and tend to be more or less horizontal terminals. The general characteristics of both the letters and of the spacing and the small individual characteristics I would say are so nearly alike that there is virtually no possibility whatsoever of any one having written [61] that except the same person.

Q. By that you mean the same person who wrote all the exemplars?

(Testimony of Dr. Kirk.)

A. Who wrote all the exemplars. There are many variations throughout the exemplars. The writing is not uniform at all. The form of the "s" is extremely varied. It is the same type of "s" in all these exemplars, though there is one exception in these letters, but the more or less figure "8" type of letter is shown in at least four of these exemplars and it is well bracketed. It is not the most common type of "s." So much variation. The "r" is another one—looks like an undotted "i." It is not too uncommon, but nevertheless completely consistent throughout both the questioned and the exemplars.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Cooke:

Q. You mentioned derogations. Can you point out any derogation between the questioned signature and the exemplars?

A. Well, I can point out between the questioned signature and certain exemplars, yes. There are no two signatures here which are identical, for the very obvious reason that people cannot make two signatures identical except by the very most remarkable chance.

Q. I do not care to argue that matter with you, but take, for [62] instance, the questioned signature, you referred to the terminal, didn't you?

A. I mentioned the terminal, yes.

Q. That is one of the points of comparison that

(Testimony of Dr. Kirk.)

you base your conclusion on that the same person wrote this that wrote the exemplar?

A. I mentioned there is a little difference as to one letter but it also shows in the exemplar.

Q. To what degree would you say that has any similarity whatever to the questioned?

A. It is somewhat similar in shape. I mean it has one of these rather short, more or less variable terminals.

Q. I am asking about this one. Do you say that has anything you can base your conclusion on that the same person wrote this letter that wrote the exemplar?

A. Oh, I certainly wouldn't know. The shape of the last stroke is the same but the terminal itself is different.

Q. Well, then, coming down to your next one, No. 4 on your photograph, would you say there is anything there in the terminal upon which you could base a conclusion that the same person wrote the questioned document?

A. No, I wouldn't base any conclusion on that terminal either.

Q. Well, here is one down here, E-10. You would give the same answer to that, would you not?

A. I pointed out that these terminals are quite variable and [63] that one terminal in the questioned document ended with a pen lift, the other one did not, and that one, simply because it is somewhat different from most of the terminals in the exem-

(Testimony of Dr. Kirk.)

plar, I was interested in finding whether it was disconnected in the exemplar and it is rather definitely disconnected in this one, E-11.

Q. I am asking about certain particular ones.

A. I do not base identity of the writing on the terminals. I merely mention that as one point that had to be accounted for.

Q. In your judgment that is not a very strong point supporting your conclusion?

A. No, merely it is not an adverse point, that is what I mean by that.

Q. You found some not at all similar to the terminal in the questioned and some are?

A. I find more are not similar than are, but there are some——

Q. What other derogation did you find when you came to compare your conclusion on the matter?

A. Well, there is a little bit less tendency to make pointed loops on the questioned signature than on many of these other signatures. However, there again that tendency is not uniform. On the first “d” is a definitely pointed loop. The “a” is very pointed and the second “a” in Sadler is very slightly pointed, if any, so I looked through the other loops contained [64] in the exemplars and I find they favor pointed and pointed ones are repeated. There is a tendency to pointing.

Q. Let us see now if we can take up specific instances. In the questioned document the word “Edgar” and “Sadler” are entirely separate, are they not?

A. Yes.

(Testimony of Dr. Kirk.)

Q. Not connected in any way? A. Yes.

Q. In your E-3 they are connected?

A. Yes, that is right.

Q. What effect, if any, has that upon reaching a conclusion that the same wrote the documents?

A. It merely tells me that the man is quite variable in the way he connects his letters and that is borne out by all the other exemplars. In some cases he connects everything, some are broken after the "S," in some cases after the "a," some places the two names are separated.

Q. The same is true as to E-4, is it not, they were connected?

A. The "S" is connected and broken between the "S" and "a."

Q. That "S" in E-4 is an entirely different shape from any other "S," is it not?

A. Yes. It is very casual, practically nothing but just a line.

Q. In reference to your E-10, the word "Sadler," what happens, so far as you can tell, there in the lettering of the "d" in [65] "Sadler?"

A. I think there was perforation through the paper at that point; a check which had been perforated and the perforated marks show a number of places here and certain parts of letters were missing because they had been perforated. I think that is what happened there. That could be checked very readily on the original which is here.

Q. Do you see any comparison, as an expert, between "d" in "Edgar" on the questioned document and the "d" in E-3 on the photograph?

(Testimony of Dr. Kirk.)

A. Yes, the appearance of the up stroke of the "d" is very, very similar and the loop is an enlarged pointed one. It is very definitely the same muscular habit that produced it. It isn't looped in the same way, that is true, but it is very definitely the same muscular movement that made it.

Q. Would you say the similarity there is sufficient to enable you to say the same man who made the "d" in "Edgar" on the questioned document made the "d" in your E-3?

A. I wouldn't on that alone, but I wouldn't draw conclusion on less than a number of exemplars in any case.

Q. There is a difference in shaping of the loop; one is enlarged whereas the other one is——

A. One is a little grater.

Q. Isn't it true, Doctor, there is a variation and derogation in every one of the exemplars that you have upon your photograph [66] from the other?

A. That is true.

Q. No two are exactly alike?

A. There are not even any two letters exactly identical, no, there practically never are.

Q. I am asking about what is here.

A. Yes.

Q. In your photo E-8, what is supposed to represent the letter "d" is "Sadler?"

A. The "l" seems to have been omitted. It is a very careless signature. The endorsement of the check.

Q. Does the fact that so many of the exemplars, as shown upon your photo, are connected, the name

(Testimony of Dr. Kirk.)

“Edgar” and “Sadler” are connected, and the questioned document is not connected, is that anything to disturb your conclusions about being the same handwriting?

A. No, it would not disturb my conclusions since both forms are shown. However, I think one can say whether they are connected or not depends whether it was rather a formal document or casual. In signing checks, for instance, they tend to be connected and in the two powers of attorney they are not connected and in signing the agreement they are not connected, so I feel the writer's habits are such he is a little more careful with important documents than less important ones, which is very common. Most people are more or less that way. [67]

Q. Is it your testimony that the signing of checks is not an important document, endorsing checks?

A. Endorsing checks is not considered as important as signing a legal document. Most people endorse their checks more casually—I believe they are more careful in signing checks than endorsing.

Q. You know the rule of bankers and the like is you have to endorse a check in exactly the same name as appears on the face? A. I know.

Mr. Thompson: Objected to as not proper.

The Court: I think he has answered.

Q. And you are also perfectly aware, are you not, in signing documents, such as this Exhibit 8 for identification, that there is no requirement of anybody that they be signed any particular way?

A. That is true.

(Testimony of Dr. Kirk.)

Q. You have given us all the reasons that you have been able to summon for the conclusion that the one who wrote these exemplars also wrote the "Edgar Sadler" on the questioned document?

A. There is nothing about the questioned which differentiates the signature from the exemplars; consequently, I feel the burden of proof shows it was obviously the same writing.

Q. My question is if you have any [68] additional reasons other than those you have already given? Are there any other reasons in your mind that lead you to the conclusion?

A. Well, one could go into more detailed analysis of each individual thing. That can be done. I have summarized them merely.

Q. You are satisfied that the facts as you have testified to are sufficient to justify your conclusion?

A. I feel very definitely that they are, yes sir.

Q. You say that it is obvious that one person wrote all of them. I suppose you mean from the general appearance and characteristics?

A. Yes, appearance, characteristics, letter form and individual idiosyncracies or unusual habits.

Q. But a person who wanted to forge a signature could do the same things, couldn't he?

A. No, he couldn't. The person who forges a signature attempts to draw it so it looks the same. When he writes freely his own muscular habits are included and he does not succeed in getting other than an extremely poor signature.

(Testimony of Dr. Kirk.)

Q. How can you tell that the name "Edgar Sadler" on the questioned document was not written freely or was?

A. By examination of the lines microscopically.

Q. What is evidenced by the microscope?

A. When written freely, the lines are continuous, unbroken, free of unusual wobbles or wavers or open spaces and [69] insertions, etc., whereas when you attempt to draw or trace, you have to keep constant watch on the model and you wobble at times or you get a little off the line and you correct it and it shows up under the microscope. It may be well enough done, not apparent to the eye, but under the microscope it shows up.

Q. You look for wavers and spaces under the microscope to determine whether it is freely written or not?

A. That is right.

Q. You found none in this case?

A. Found none.

Q. Can you describe just how they appear? Suppose we had one that had these spaces and wavers. Do you mean wavers, sort of up and down motion?

A. Up and down or slightly jerky or very commonly just sharp angles.

Q. As though the party writing had stopped to think?

A. That is the way it looks. In a curve, for example, the curve might progress by a series of short, straight lines instead of being smoothly curved. If you draw the curve freely, there will not be any angles in it.

Testimony of Dr. Kirk.)

Q. Does the microscope show that there are any formations of that kind you just described in the questioned signature?

A. I think there were no wavers there.

Q. What are these bumps occurring in the terminal and also in [70] the letters "d", "e", and "l" in Sadler?

A. That is what I mentioned.

Mr. Thompson: You are referring now to the photographic enlargement of Exhibit 8?

Mr. Cooke: Yes.

A. It is feathering, due to a little dirt on the pen and I examined it under the microscope. It wasn't something connected with the writing.

Q. Does that same answer apply to the wavering or the irregularities in "Edgar," particularly in the "gar" in Edgar?

A. That is correct.

Q. You think that is accounted for by the ink being dirty?

A. I think that is accounted for by lint on the pen and it shows the same thing in the second signature here. You will notice feathering along some of these letters, not as distinct, but it is there.

Q. You are now talking about Alfred Sadler?

A. Yes, written below. This paper, of course, is cheap paper and sometimes fibers pick up on the pen point, or may have been lint, but I am very strongly inclined to believe something of that nature which caused the feathering.

Q. Did you examine the body of the document by microscope to ascertain any waverings or irregularities in the writing?

(Testimony of Dr. Kirk.)

A. Nothing approaching full examination. I undoubtedly looked at it microscopically but not with intention of [71] proving that point.

Q. Looking at it with the naked eye as it is there on the table before you, do you observe anything indicating that there are any waverings or irregularities as that was written by Mr. Alfred Sadler?

A. No, I see nothing there that would indicate any such thing.

Q. You haven't any way of determining, from such examination you made, whether the same pen was used in writing the name Edgar Sadler and the name Alfred Sadler in the body of the document have you?

A. Sometimes you can tell, but not with absolute certainty. More particularly two people using the same pen will make a difference in appearance because they press differently and hold at different angles, or possibly the same pen will look different. I would assume those were written by the same pen and ink. I don't think there is any significant difference there, but I can't say positively.

Q. That would include the entire body of the document and the name Edgar and Alfred Sadler?

A. That is correct.

Q. And there is nothing in the body of that document that would indicate to you that the ink used there was not the same as the ink used in Edgar Sadler writing?

A. Nothing on superficial examination. I could tell the difference, if there was a difference, by the use of chemicals [72] and comparison by the microscope.

(Testimony of Dr. Kirk.)

Q. You have not made that test?

A. But I did not make that test, no.

Q. Have you made any study of the subject of this particular document and its genuineness or examination since July 17th when Mr. Thompson and Clarence Sadler called?

A. Oh, within the last day or two I took out the pictures to look them over again, yes. I have not made any study of the originals, however, because I have not seen those since July except for about five minutes this morning.

Q. How soon after July 16, 1946, when these gentlemen visited you, did you begin the work of preparing the photostats and so on?

A. They were photographed, I believe the same day, the 17th of July, that is, the negatives were taken, and my examination was made primarily on the 18th.

Q. What is the name of the photographer who did the work for you under your supervision?

A. He is not a photographer. He is a colleague in the University named Dr. Craig.

Q. What are his initials?

A. R. Broderick.

Q. He is not a photographer?

A. Not a professional photographer. He actually is associate professor of entomology. [73]

Q. He is a competent photographer?

A. He is competent. Has much insect photography to do.

(Testimony of Dr. Kirk.)

Q. You can do it yourself, can you?

A. I can, yes. I have many times.

Q. And the entire work was completed then on the 18th, is that correct?

A. I wouldn't say everything was completed on the 18th but the bulk of it certainly was. I didn't return the document for a few more days and I undoubtedly examined them over a period of a couple of days.

Q. I suppose you submitted a report to Mr. Thompson and Mr. Sadler?

A. Yes.

Q. Is that report in writing?

A. It was in writing.

Q. Have you a copy of that report?

A. Not with me.

Q. Have you the original, Mr. Thompson?

Mr. Thompson: We have it, yes.

Mr. Cooke: I would like to see it.

Mr. Thompson: I think it is rather irrelevant. The witness' testimony is the best evidence.

Mr. Cooke: I would like to see the report.

The Court: It is optional. If he wants to see it, it is all right, but I don't think it [74] should be ordered.

Mr. Thompson: He can have it. Some of the markings on the report are mine.

Mr. Cooke: The red?

Mr. Thompson: Yes.

Mr. Cooke: Yes, I understand that. This is merely a summary of his testimony?

(Testimony of Dr. Kirk.)

Mr. Thompson: It agrees with his testimony, doesn't it, Mr. Cooke?

Mr. Cooke: I think so. That is all.

Cross-Examination

By Mr. Furrh:

Q. Doctor, how many points of similarity do you insist upon before you prove as to whether or not it is a genuine document?

A. I don't know as I can answer that question exactly because sometimes it is difficult to tell exactly what is a point. Eight to 12 points is usually considered proof and I do not believe I would care to decide on less than that.

Q. At least 8 to 12? A. I think so.

Q. Were there at least that many points of similarity?

A. There is no question there were that many points of similarity.

Q. Doctor, when you make this examination, do you line out the points that indicate the signatures were made by the same individual and also the points that indicate the signatures might [75] not have been made by the same individual?

A. I always mark both of them, certainly. I do not line them up but I make notations on the differences throughout.

Q. Then if you had, say 20 points of dissimilarity and 10 points of similarity, would the greater number control?

(Testimony of Dr. Kirk.)

A. Not necessarily, because if there is a dissimilarity that you can't account for, that is much more than a similarity. In other words, I would assume if two writings were very obviously similar, then it would be important to look for dissimilarities and if you can't find any duplication in your exemplars, I would be very leary of that, because in every examination you run into exemplars that are extremely close together and they turn out not by the same person.

Q. Can you say how many points of dissimilarity there were between the questioned document in this case and the known signatures?

A. There were more similarities than dissimilarities and I didn't find any real dissimilarities. The whole thing is similar.

Q. You say usually 8 to 12 points, didn't you, make up your opinion?

A. Yes, if you break it down.

Q. Can you say how many points of similarity you found in this case?

A. I didn't count them. I merely recorded the similarities [76] I found the *dissimilarities* and the dissimilarities in this case were—in no case did I consider them great. The similarities were uniform throughout. I mentioned, for example, the general similarity of the "e" which can be found but there are some exceptions to that; for instance, in E-9 it is extended, but it is still similar, and the bottom of the "e" is quite universally the same and you

(Testimony of Dr. Kirk.)

can go through each letter the same way and you find in every case either the dissimilarity is not there or you find both similarity , dissimilarity. I did not list the exact number.

Q. There were at least eight or more points of similarity?

A. Oh yes, I am sure there must have been more than that.

The Court: The Doctor may be excused.

Mr. Thompson: We offer Exhibit 8 in evidence.

Mr. Cooke: The defendant objects on the ground the proper foundation has not been laid to establish the signature of Edgar Sadler and placed there by Edgar Sadler, not established by any witness that the document and handwriting upon it was there at the time it was signed. It may have been a document with his signature was picked up and written there by somebody else. It takes more than the mere matter of signature to establish that this paper was signed and agreed to by Mr. Sadler. Somebody else wrote the body. Whether that was written before or after the name Edgar Sadler was put there is not shown. He denies that that paper was in that condition. [77] He never signed any such paper.

The Court: The objection is overruled and Exhibit 8 admitted in evidence.

Mr. Thompson: If the Court please, we offer in evidence Plaintiff's Exhibit 17 for identification, which is a certified copy of inventory and appraisal in the matter of the Estate of Reinhold Sadler,

deceased, in the District Court of the First Judicial District of the State of Nevada, in and for the County of Ormsby.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of the document, on the ground that it is irrelevant and immaterial and no proper foundation has been laid, in that it does not purport to be anything that would constitute legal evidence against Edgar Sadler. It is not connected with him in any way, but is simply the hearsay statement of a third party as to what pertained to the estate of Reinhold Sadler at the time this was made, on or about shortly after May 3, 1906. Your Honor is probably familiar with these documents in State courts. First is the usual certificate by the county clerk that certain persons were appointed appraisers, then follows the oath of the appraisers, that they would well and truly appraise, to the best of their ability, and then here is the affidavit of Louisa Sadler, the administratrix, etc. Now that is just merely a statement of Louisa Sadler that this inventory contains a true statement of [78] the property of Reinhold Sadler, so far as she knows, but if you put that in evidence against a third party, who did not have anything to do with the preparation of it, not consulted in regard to it, for the purpose of showing that that property did not belong to the third party but to the estate, would be beyond the rules of evidence. This appears to be a legal paper and there is no difference between that statement of Louisa Sadler that certain property belonged to the estate of Reinhold Sadler,

occurring in that document, than if she told it to John Roe on the street or made an affidavit for some other person. A hearsay statement is one made by some one out of the presence of another and this was a statement that was made, so far as the record shows, out of the presence of Edgar Sadler and it is sought now to put that fact into evidence as presumed that the property listed in this inventory belonged to the estate, which, of course, is one of the issues in this case. Just how that kind of a document could constitute legal evidence is impossible for me to say because if it should then all anybody would have to do in an estate would be to lay claim to everything in sight and then after 10 or 40 years put that in evidence as evidence of title. That is all that this document here could possibly accomplish. We object to it on the further ground that it does not purport, in any event, to be any claim of Louisa Sadler to any of the property involved in this case. The property involved, in this case, your Honor, of course your [79] knows is the so-called Diamond Valley Ranch in Eureka County. There is no reference whatever to the Diamond Valley Ranch as being property of Reinhold Sadler at the time he died. The only reference there is that there were 4,000 shares of capital stock of that company that belonged to Reinhold Sadler at the time he died, but the stock, of course, is not evidence of the ownership by Reinhold Sadler of any interest in the property. That we know from law. That is the only reference to the property in controversy here. So far as any personal property is concerned, the

livestock, there is no mention made of it, as I recall. I have studied it on previous occasions. So that the question of the stock, the shares of stock, being owned by Reinhold Sadler is not anything that we are concerned with here. They are not mentioned in the so-called trust agreement, not mentioned in the stipulation, not mentioned in the decree. If your Honor was called upon at this moment to decree a trust, you wouldn't decree any trust in any shares of stock because of the fact that it is not real property for one thing and not a point in this case for another, not described in the pleadings anywhere. We are not concerned with the shares of stock. It is true that in the complaint it is alleged that he was the owner of some shares of stock in the company at the time he died. It is also true that we deny it, but that does not make it material, your Honor, it does not make a material issue [80] simply because somebody asserts it. After all, it is a question as to whether matter which is alleged and denied is a material issue in the case. If we had said that the moon was made of green cheese and somebody denied it, of course it wouldn't be an issue in the case and that is comparable, I think, to this document, because of the fact the stock is not involved in the case, they do not plead it in their complaint so it seems to me they are out of line in urging ownership of stock when they do not ask and do not pretend to ask for any trust in reference to any stock. So we insist upon the objection, if your Honor please.

The Court: What is the purpose of the offer, Mr. Thompson?

Mr. Thompson: The purpose, your Honor, is to show, according to the inventory and appraisment of Reinhold Sadler estate, at the time of his death he owned 4,000 shares of stock in the Huntington & Diamond Valley Land & Live Stock Company, a matter which was denied by Edgar Sadler with much vehemence by special motion to amend his answer. It is material to show the condition of the affairs of Reinhold Sadler at the time of his death and at the time of the execution of the alleged trust agreement.

The Court: The administration proceedings have been completed?

Mr. Thompson: No, your Honor, it is alleged in the [81] amended complaint and admitted by the defendant that the administration of the estate was never closed.

The Court: There is no order of distribution?

Mr. Thompson: No, your Honor.

The Court: All that could be claimed to show, it seems to me, would be to show that the administration of the estate said the stock was the property of Reinhold Sadler.

Mr. Thompson: I think Mr. Cooke's objection affects the weight of the evidence rather than its admissibility, but your Honor must remember that we are dealing with matters that occurred 25 years ago.

The Court: The objection will be overruled and it will be admitted in evidence as Plaintiff's Exhibit No. 17.

PLAINTIFF'S EXHIBIT No. 17

In the District Court of the First Judicial District
of the State of Nevada, in and for the County of
Ormsby

In the Matter of the Estate of

REINHOLD SADLER

Deceased

INVENTORY AND APPRAISEMENT

I, H. B. Van Etten, County Clerk and ex-officio
Clerk of the District Court, do hereby certify that
D. H. Hall, J. A. Burlingame and P. B. Ellis, were
duly appointed Appraisers in the Estate of Reinhold
Sadler, deceased, by an order of said Court, duly en-
tered on the day of, 1906.

Witness my hand and the Seal of said Court this
3d day of May, 1906.

[Seal]

H. B. VAN ETTEN,
Clerk.

By,
Deputy.

State of Nevada,
County of Ormsby—ss.

D. H. Hall, J. A. Burlingame and P. B. Ellis,
duly appointed Appraisers of the Estate of Rein-
hold Sadler, deceased, being duly sworn, each for

himself, says: That he will truly, honestly and impartially appraise the property of said Estate, which shall be exhibited to him, according to his best knowledge and ability.

D. H. HALL,

P. B. ELLIS,

J. S. BURLINGAME.

Subscribed and sworn to before me this 3 day of May, 1906.

H. B. VAN ETEN,

Clerk.

State of Nevada,
County of Ormsby—ss.

I, Administrator of the Estate of Reinhold Sadler, deceased, being duly sworn, say: That the annexed inventory contains a true statement of all the Estate of the said deceased which has come to my knowledge or possession, and particularly of all moneys belonging to the said Estate, and of all just claims of said deceased against me.

LOUISA SADLER.

Subscribed and sworn to before me this 18th day of May, 1906.

.....,

Clerk.

INVENTORY

House & Lot Block No. 7—Phillips Div. Carson City, Nev., occupied as a home- stead by deceased and family at time of his death	\$1,200.00
Household furniture contained in home- stead, in use by family of deceased in the homestead in Carson, City, Nev.	300.00
Policy No. 771849, in Mutual Life Ins. Co. of New York.....	2,500.00
4000 Shares Cap. Stock of Huntington & Diamond Valley Live Stock and Land Co.	3,750.00
4000 Shares of the Capital stock of Eureka Gold Mines Development Co.....	100.00
Undivided 13/100th interest in the 12 min- ing claims situated in Robinson Mining District, White Pine County, Nevada, known as and called the "Great West- ern," "Joanna No. 2," "Cloud," "Roo Roy," "Hidden Treasure," "General Ar- thur," "General Logan," "Mitchell," "Emma," "Ontario," "Chief," "Point"	1,500.00
Patented Mining claims in Newark Valley Mining District, White Pine County, Ne- vada, known as "Battery," "Ceylon," and "Sanches"	300.00
Lots 4 & 5, Block 37, in town of Eureka, Nev., & store buildings.....	1,400.00

Lot 4, Block 58, town of Eureka, Nev.....\$	25.00
Lot 4, Block 75, town of Eureka, Nev., & stables	220.00
Lot 13, in Block 37, town of Eureka, Nev..	25.00
Lots 15 & 16, Block 21, town of Eureka, Nev.	50.00
Lots 1, 2, 3 & 4, Block 94, town of Eureka, Nev.	50.00
Lots 1, 2, 3 & 4, Block 96, town of Eureka, Nev.	25.00
Lots 7, 8, 9 & 10, Block 19, town of Eureka, Nev.	50.00
W. 35 ft. of lot 12 & N. 25 ft. lot 13, Block 59, town of Eureka, Nev.....	20.00
Lot 14, Block 17, in town of Eureka, Nev..	10.00
Lots 4 & 5, Block 40, in town of Eureka, Nev. & brick dwelling thereon.....	530.00
Lot 8, Block 22, in town of Eureka, Nev....	50.00
N. 15 ft. of Lot 8, Block 36, town of Eureka, Nev.	25.00
One third undivided interest in Opera House and Lot 3, Block 23, town of Eu- reka, Nev.	750.00
Lot 15, Block 36, town of Eureka, Nev....	25.00
320 acres of land known as Nickals hay ranch, in Eureka Co., Nev.....	100.00

The administratrix called the attention of appraisers to the sum of \$872.16, on deposit in Bank of Nevada, Reno, Nev., for which she holds certificate of deposit issued in her, which sum, administratrix stated, had come into possession of and was held by deceased as Treasurer of the Grand Lodge, Knights of Pythias, and so advised the administratrix before his death, which sum, we did not include in this appraisal, believing from the statement of administratrix, that said sum was held by deceased, in trust for said Grand Lodge.

\$13,005.00

Judgment in favor of Reinhold Sadler in case Wm. McMillan vs. Reinhold Sadler in Supreme Court State of Nevada, for \$641.—which paid judgment is of unknown value.

We, the undersigned, duly appointed Appraisers of the Estate of Reinhold Sadler, deceased, hereby certify that the property mentioned in the foregoing inventory has been exhibited to us, and that we appraise the same at the sum of Thirteen Thousand and Five Dollars.

Dated May 3, 1906.

[Seal]

D. H. HALL,
Appraiser.

P. B. ELLIS,
Appraiser.

J. S. BURLINGAME,
Appraiser.

State of Nevada,
County of Ormsby—ss.

I, Marietta Legate, County Clerk of Ormsby County, State of Nevada, and ex-officio Clerk of the District Court, in and for the County of Ormsby, do hereby certify that the foregoing is a full, true and correct copy of the original Inventory and Appraisement, in the matter entitled: In the Matter of the Estate of Reinhold Sadler, Deceased, which now remains on file and of record in my office in said Carson City, in said County.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Carson City, in said County and State, this 25th day of September, A.D. 1946.

[Seal] /s/ MARIETTA LEGATE,
 Clerk.

[Endorsed]: Filed Oct. 14, 1946.

Mr. Thompson: We offer in evidence Plaintiff's Exhibit No. 18 for identification, which is a certified proof of claim filed by Minnie C. Sadler against the Estate of Reinhold Sadler, deceased, in the First Judicial District Court of the State of Nevada, in and for the County of Ormsby.

The Court: This might be a good point at which to take our recess until tomorrow morning. Court will be in recess until tomorrow morning at 10:00 o'clock.

(Recess taken at 5:00 p.m.) [82]

Tuesday, October 15, 1946

10:00 A.M.

Appearances as at previous session.

The Court: Are you ready to proceed, now, gentlemen?

Mr. Thompson: Plaintiff is ready, your Honor. When we concluded yesterday, your Honor, we had offered in evidence Plaintiff's Exhibit 18 for identification.

Mr. Cooke: The defendant makes the same objection to the admission in evidence of the Plaintiff's Exhibit 18 for identification, upon the ground that it is irrelevant, immaterial, not in issue in this case, particularly as to any ownership by the plaintiff, Clarence Sadler, of any interest, either legal or equitable, in the property described in the complaint. That the document merely purports to be a promissory note for \$10,425, signed by Reinhold Sadler and payable to Mrs. Minnie C. Sadler, and annexed to that is her affidavit in the usual form in cases filed for claim against an estate, and the note is security of 1999 shares of stock in the Huntington & Diamond Valley Land and Stock Company, a California corporation, by assignment of the stock to the affiant by the said decedent, Reinhold Sadler, etc. We wish to add to our objection that under the rule of entirety the document is not admissible in evidence because it shows on its face that there are other documents made a part of it which are not included in the offer, to-wit, the as-

signment of the stock to the affiant by the decedent, copy of which is hereto annexed. It is not [83] hereto annexed. All we have here is merely the promissory note and affidavit as to the claimant.

The Court: Mr. Cooke, you filed an amended answer?

Mr. Cooke: Yes, sir.

The Court: Denying Paragraph 2 of the amended complaint?

Mr. Cooke: That is right.

The Court: Did you file an answer?

Mr. Cooke: No, I think it was agreed that I might file a sticker, put that amendment on a sticker.

Mr. Thompson: I think it was just ordered, your Honor, that the answer be amended in accordance with the statement in the motion.

The Court: There should be, I think, formal orders filed or pleadings filed so the file is complete.

Mr. Cooke: There is an order made permitting the amendment and I have prepared—there was some talk as to whether it could be corrected by interlineation and as I recall I was to prepare a sticker paragraph which could be attached.

The Court: I think it would be well to do that so anyone picking up this file could see what the issues are.

Mr. Cooke: I have that here, your Honor. Here is [84] the way I understood it. That is a copy of the amendment as set up in the motion.

Mr. Thompson: This proposed sticker is in accordance with your Honor's order.

The Court: If that sticker was annexed to Edgar A. Sadler's answer, with a note made by the Clerk that it is in accordance with order made on the particular date that we heard that motion, that would complete the file, wouldn't it?

Mr. Cooke: I think so.

The Court: So that can be done later on. I understand the purpose of this is merely to show a right of authority or ownership of that stock by the deceased, Reinhold Sadler.

Mr. Thompson: There are two purposes, your Honor. First, to show that the claim was filed by Minnie C. Sadler, and secondly it is evidentiary of the fact that Reinhold Sadler owned 1945 shares of stock in the company, subject to the lien of the claim.

The Court: Just how is Minnie C. Sadler connected here?

Mr. Thompson: She is the wife of Reinhold Sadler's brother, Herman Sadler. I will bring that out in the testimony. [85]

Mr. Cooke: We would like to add to the objection that that proof there, instead of showing specific interest in the plaintiff, Clarence Sadler, shows whatever interest there was in that stock is vested in Minnie C. Sadler.

The Court: Objection overruled and exhibit admitted in evidence as Plaintiff's Exhibit 18.

PLAINTIFF'S EXHIBIT No. 18

\$10425.00

Eureka, Nevada, Dec. 29, 1888.

On the second day of January, 1889, without grace, I promise to pay to the order of Mrs. Minnie C. Sadler Ten Thousand Four Hundred and Twenty-five Dollars, with interest at the rate of five (5%) per cent. per annum from date until paid. Principal and interest payable only in Gold Coin of the Government of the United States, for value received. This note is payable at option of holder in Nevada or California.

REINHOLD SADLER.

District Court

State of Nevada,
County of Ormsby.

In the Matter of the Estate of
Reinhold Sadler,

Deceased

*

State of California,
County of Alameda

Minnie C. Sadler of said last named county and state, being duly sworn makes oath and says that at the time of his death the above named Reinhold Sadler, was justly indebted to this affiant in the sum of Ten thousand and four hundred twenty-five dollars with interest thereon at the rate of five per cent per annum from the 29th day of December

1888 amounting to \$9100.11 interest and aggregating \$19525.11 interest and principal. That said indebtedness arose and was incurred on account of moneys loaned by the affiant to the decedent and represented by his promissory note made by him and delivered to the affiant and now in her possession, a copy of which note and endorsements of all payments made thereon is hereto annexed, herewith filed and made a part hereof. That said note is secured by 1999 shares of stock of the Huntington and Diamond Valley Land and Stock Co., a California corporation, doing business in Nevada, by assignment of said stock to the affiant by said decedent as collateral security, a copy of which assignment and shares of stock are hereto annexed and herewith filed as a part hereof, the originals thereof being in affiant's possession by delivery from said decedent in his life time. That there is now justly due and owing to affiant on account thereof from the estate of Reinhold Sadler, deceased \$10425, principal and \$9100.11 interest thereon as aforesaid, making \$19525.11 in all. That no payments have been made thereon which are not credited and there are no offsets to the same to the knowledge of this claimant.

[Seal]

MINNIE C. SADLER.

Subscribed and sworn to before me this 16th day of June, 1906.

[Seal]

CARY HOWARD,

Notary Public, Alameda Co.,
Cal.

State of Nevada,
County of Ormsby—ss.

I, Marietta Legate, County Clerk of Ormsby County, State of Nevada, and ex-officio Clerk of the District Court, in and for the County of Ormsby, do hereby certify that the foregoing is a full, true and correct copy of the original Proof of Claim, in the matter entitled:

In the Matter of the Estate of
Reinhold Sadler, Deceased

which now remains on file and of record in my office in said Carson City, in said County.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at Carson City, in said County and State, this 25th day of September, A.D. 1946.

[Seal] /s/ MARIETTA LEGATE,
Clerk.

State of Nevada
County of Ormsby

District Court

In the Matter of the Estate of
Reinhold Sadler, Deceased

Proof of Claim

Minnie C. Sadler, Claimant

Amount \$19525.11

For Promissory Note

Address of Claimant, No. 249 Hanover Street,
Station L, San Francisco, California

Filed June. 19, 1906.

H. B. VAN ET TEN,
Clerk.

The within claim presented to the administratrix
of said estate deceased and allowed and approved
for \$19525.11 this 9th day of July, 1906.

LOUISA SADLER,
Administratrix.

Allowed and approved for \$19525.11 this 21st day
of July, 1906.

M. A. MURPHY,
District Judge.

[Endorsed]: Filed Oct. 14, 1946.

EDGAR A. SADLER

resumed the witness stand as an adverse witness
on further

Cross-Examination

By Mr. Thompson:

Q. Mr. Sadler, after your father's death and
prior to March 2, 1918, you knew, did you not, of
the fact that Minnie C. Sadler had filed a claim
against your father's estate? A. Yes.

Q. And you knew that that claim was in the
total sum of \$19,525.11?

A. I didn't know how much it was for.

(Testimony of Edgar A. Sadler.)

Q. You knew it was for a substantial amount of money? A. Oh, yes.

Q. Now isn't it true, Mr. Sadler, that the claim of Minnie C. Sadler against the estate of your father, Reinhold Sadler, was involved in the settlement of the quiet title suit in Elko County?

A. I don't know.

Q. Isn't it true that Minnie C. Sadler agreed to withdraw that claim against your father's estate as part of the settlement [86] arranged by that quiet title suit?

A. No, I didn't know anything about it.

Q. Minnie C. Sadler was the wife of your father's brother? A. Yes.

Q. Your father's brother's name was Herman Sadler? A. Yes.

Q. And he had a son, Herman J. Sadler?

A. Yes.

Q. And it was his son, Herman J. Sadler, who was active in the management of the Huntington & Diamond Valley Land & Stock Company at the time of the quiet title suit? A. Yes.

Q. Now in order to refresh your recollection about the terms of that settlement, Mr. Sadler, I want to show you a letter. I show you Plaintiff's Exhibit 19 for identification. Will you examine it and state whether or not that refreshes your recollection about the terms of the settlement of the

(Testimony of Edgar A. Sadler.)

quiet title suit. Does that refresh your recollection at all regarding the terms of that suit?

A. Well, I don't know anything about it.

Q. Are you familiar with the signature of Mr. H. U. Castle? A. Not too well.

Q. Are you sufficiently familiar with it to form an opinion as to whether the signature on this letter, Exhibit 19 for identification, is his signature?

A. Yes, that is his signature.

Mr. Thompson: I offer the letter, Exhibit 19, in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of the offer 19 for identification, on the ground that it is immaterial and irrelevant and no proper foundation has been laid in that it is not shown that the witness had anything to do with it or ever saw it. It is on its face addressed to Alfred Sadler and not to the witness. That if it is offered for the purpose of showing any disposition of the stock of Minnie C. Sadler, there is no foundation for it, on the ground that her name is not mentioned and there is no way of identifying the reference made in this letter with Minnie C. Sadler, if that is the purpose of it. That it is hearsay; that it is not a part of the legal business of the attorney. It is made after the suit went to judgment and not anything that the attor-

(Testimony of Edgar A. Sadler.)

neys presumably were authorized to make representation as to their client.

Mr. Thompson: We would like to point out, your Honor, that the testimony shows that Mr. Castle was the duly authorized——

The Court: Just a moment. Let me read it, Mr. Thompson. (Reads.) All right, Mr. Thompson.

Mr. Thompson: The evidence shows, your Honor, that [88] Mr. Castle was the duly authorized attorney for Edgar Sadler and Alfred Sadler, that the firm of Curler & Castle represented them in Elko and the firm of Cheney, Downer, Price & Hawkins represented them in Reno. One of the letters in evidence shows that the arrangement was made because of the difficult travel conditions and they wanted to have an attorney on the job in Elko. The powers of attorney are in evidence, showing that Alfred Sadler represented himself and other heirs of Reinhold Sadler, deceased, and we offer the letter as a business communication between the duly authorized agent of Edgar Sadler and other parties involved in this transaction.

The Court: It will be admitted in evidence as Plaintiff's Exhibit 19.

(Testimony of Edgar A. Sadler.)

PLAINTIFF'S EXHIBIT No. 19

B. F. Curler

H. U. Castle

Curler & Castle
Attorneys at Law
Elko, Nevada

March 18, 1918.

Mr. Alfred Sadler,
Reno, Nevada,

Dear Alfred:—

Just received the deed from the Corporation conveying the Diamond Valley Ranch to you and Edgar which is in addition to the decree and the deed made by Hermann as attorney in fact. Also got the withdrawal from your aunt withdrawing all claims against your father's estate. These papers I have sent to Cheney, so please call at his office and get the withdrawal and do what you wish with it.

Have delivered the deeds to Van Fleet, I mean the Harvey and Wilhelmine Sadler patents have been turned over.

I just want to add that on the day we got back to Elko, Edgar was offered \$40,000 for the ranch alone but refused to take it as he is holding for a better price in case you and he wish to sell. Better keep this to yourself though as Bertha may raise or try to raise more hell.

Sincerely yours,

CURLER & CASTLE,

By /s/ H. U. CASTLE.

[Endorsed]: Filed Oct. 15th, 1946.

(Testimony of Edgar A. Sadler.)

Q. Who is Harvey Carpenter, Mr. Sadler?

A. Don't you know?

Q. No, I don't.

A. Well, I guess I will have to tell you. He is a man that lived in Eureka County, I guess for a long time.

Q. He was a friend of your father, Reinhold Sadler?

A. He might have been.

Q. Do you know whether he was or not?

A. I do not know.

Q. Did you ever see them together?

A. No.

Q. Who was Wilhelmina Sadler? [89]

A. That is my sister.

Q. She died prior to your father's death, did she not?

A. She did.

Q. Don't you know that a good many of the contracts for the purchase of lands for your father from the State of Nevada were taken in the names of other persons, including Wilhelmina Sadler and Harvey Carpenter?

A. Sure they were. They couldn't have got the land if they hadn't taken it up that way.

Q. And those are lands that were claimed by your father, Reinhold Sadler, and by the Huntington & Diamond Valley Land & Stock Company, were they not?

A. I suppose so.

Q. Mr. Sadler, you recall the time of your brother, Alfred's, death?

A. Yes, I was here.

(Testimony of Edgar A. Sadler.)

Q. He died March 5, 1944, did he not?

A. Yes.

Q. And you were present in Reno, Nevada, with your wife, Ethel Sadler, on March 6, 1944, the following day?

A. The following day?

Q. Yes. A. Yes, we were here.

Q. And weren't you present in the home of Kathryn Sadler, Alfred Sadler's wife, on that date?

A. We were there in the evening.

Q. And Clarence Sadler, the plaintiff, was present there also?

A. Yes.

Q. At that time do you not recall that Clarence Sadler said to you in substance that while you were there together it would be a good time to talk about the ranch and settle his interest in it?

A. He didn't say his interest; he said settle about the ranch.

Q. And at that time did you not say to Clarence Sadler that he had no interest in the Diamond Valley Ranch whatsoever?

A. Yes, sir.

Q. Isn't that the very first time that you ever said to Clarence Sadler, in substance or effect, that he had no interest whatsoever in the Diamond Valley Ranch or the cattle thereon or any of the equipment?

A. No, sir.

Q. What is the first time that you said that to him?

A. Oh, it was in '25 once.

Q. 1925?

A. Yes, and before that.

Q. Before that, too?

A. Yes.

Q. When before that, when before 1925?

A. I don't know the date.

(Testimony of Edgar A. Sadler.)

Q. Well, do you recall the occasion when you were together? [91]

A. Well, they were out to the ranch.

Q. Before 1925? A. Yes.

Q. They were out to the ranch? Now who are "they?" A. Clarence and his wife.

Q. They visited the ranch, that is, the Diamond Valley Ranch in Eureka County? A. Yes.

Q. Before 1925? A. Yes.

Q. Do you remember the date?

A. No, I couldn't remember the date.

Q. Well, how long before 1925?

A. Well——

Q. Did they visit the ranch every year?

A. No.

Q. Well, was it two or three years before 1925?

A. I think it was.

Q. You think it would be about 1922?

A. Somewhere along in there.

Q. You think that is about right? A. Yes.

Q. Now you say as you recall it some time about 1922 Clarence Sadler and his wife, that is Doris Reba Sadler, were at your ranch, the Diamond Valley Ranch? [92] A. Yes.

Q. And you had a conversation then?

A. Yes.

Q. And who else was there beside yourself?

A. My wife.

Q. Your wife, Ethel Sadler? A. Yes.

Q. Anybody else?

A. I don't think so.

(Testimony of Edgar A. Sadler.)

Q. What did you say to Clarence Sadler at that time?

A. Well, he was talking about the ranch and I told him he had nothing to do with it.

Q. By "nothing to do with it" were you referring to nothing to do with the management of the ranch?

A. With any of it.

Q. Did you tell him he didn't have any interest in the ranch at all?

A. I said he didn't have anything to do with the ranch.

Q. Now in 1925 you say you had another conversation with him?

A. Yes.

Q. And where did that conversation take place?

A. At the ranch.

Q. And who was present then?

A. Well, my wife was there.

Q. Your wife, Ethel Sadler? [93]

A. Yes.

Q. Was Clarence's wife there?

A. No.

Q. Just Clarence and your wife, Ethel Sadler, and yourself?

A. Yes.

Q. And do you remember about what month in 1925 that was?

A. I think it was September.

Q. You think it was September, 1925?

A. Well, the deer season was open then. He was up there hunting deer with another man from his office.

Q. Do you recall the other man's name?

A. No, I didn't know the man at all.

Q. What was the conversation that you had at that time?

A. Same thing.

(Testimony of Edgar A. Sadler.)

Q. You told him he didn't have anything to do with the ranch? A. Yes.

Q. Well, what had he said to you that caused you to say that?

A. Well, he said he had an interest in the ranch.

Q. Clarence told you that he had an interest in the ranch? A. Yes.

Q. And you told him that he didn't have anything to do with the ranch? A. Yes.

Q. Is that what happened? A. Yes. [94]

Q. Now when was the next time you talked to him about that?

A. That's all.

Q. Just those two times?

A. No, that time my brother died.

Q. Yes, that is in 1944? A. Yes.

Q. Any other time? A. No.

Q. Those are the only two times that you talked to him about it? A. Yes.

Q. Did you talk to him about it in 1938?

A. I don't know. I don't think so.

Q. Well, you allege in your answer, Mr. Sadler, that you did talk to him about it in 1938. Do you recall that now? I show you paragraph I of the first affirmative defense of the answer you filed in this case.

A. That's the time he was up there hunting deer, I think, '38.

Q. You think that was the time he was up there hunting deer? A. I think so.

(Testimony of Edgar A. Sadler.)

Q. Who was with him then?

A. That fellow from his office. I don't know what his name was.

Q. And so, as I understand it, the instance you related as having happened in about 1925 happened in 1938, is that right? [95]

A. Yes.

Q. Or was he there hunting deer twice?

A. No.

Q. Then in 1938 he asked you about his interest in the ranch and you told him he didn't have anything to do with it?

A. Yes.

Q. Continuously since 1922 or 1923 have you denied that Clarence Sadler had any interest in the ranch?

A. Yes.

Q. Have you ever so stated to Alfred Sadler?

A. No.

Q. Just to Clarence, is that right?

A. Yes.

Q. Did you ever state to Alfred Sadler that he, Alfred Sadler, didn't have any interest in the ranch?

A. No.

Mr. Cooke: I move the answer be stricken until I can make my objection.

The Court: It may go out.

Mr. Cooke: We object on the ground that calls for transaction of a deceased person. This shows here that Alfred Sadler died in March, 1944, and under the so-called dead man statute in Nevada I think this would be objectionable and incompetent because it is asking him to testify to what he may have said to Alfred Sadler in regard to certain

(Testimony of Edgar A. Sadler.)

subject matters [96] stated in the question. He should not be permitted to go into such testimony as that. I make the further objection as to Alfred Sadler——

Mr. Thompson: I withdraw the question, your Honor.

Q. Mr. Sadler, how many cattle were on the Diamond Valley Ranch in Eureka County, Nevada, in Feburary and March, 1918?

A. Whose cattle?

Q. How many cattle on the ranch?

Mr. Cooke: Objected to. The only cattle we have to do with here are cattle that belonged to the estate.

The Court: Objection is overruled. You may answer the question.

A. Whose cattle do you mean?

Q. All the cattle on the ranch. How many?

A. There might have been a thousand or more.

Q. All right. How many head of those cattle belonged to you personally?

A. About 200 head.

Q. You have alleged in your answer that not more than 50 head bore the brand of Reinhold Sadler, is that correct?

A. There was no brand of Reinhold Sadler.

Q. What is the "J C" brand?

A. I branded them myself and I claimed them and the Huntington & Diamond Valley Land & Stock Company claimed them.

Q. In whose names was that brand [97] registered?

(Testimony of Edgar A. Sadler.)

A. Well, it was registered in my mother's name.

Q. In the name of your mother, Louisa Sadler, is that right? A. Yes.

Q. And as you recall it there ware about 50 head of cattle bearing that brand?

A. No, there wasn't that many.

Q. How many were there?

A. Probably 20 or 25.

Q. What is your personal brand?

A. Two half circles.

The Court: What is the first brand you referred to?

Mr. Thompson: I think it is J C.

A. No, it is J bar C.

Q. Will you explain J bar C brand, how is it made?

A. You want me to draw it? Well, it is J and then a bar and C connected.

Q. The bar connects the J and the C, is that correct? A. Yes.

Mr. Thompson: That is all, your Honor.

Examination

By Mr. Cooke:

Q. You just stated on your cross-examination that you used the J bar C brand, you put that on some of your own cattle. Just how was that handled? Why would you brand that when you had your own brand? [98]

A. When I got my own brand, I didn't use that brand.

(Testimony of Edgar A. Sadler.)

Q. When did you get your own brand, that is the interlocking quarter or half circle?

A. It was before 1906.

Q. Well, you told us on your cross-examination that there were some 20 head of the J bar C cattle on the ranch. How were they branded and when and by whom, if you know?

A. They were branded by me, my men that worked there.

Q. Well you just told us after you got your brand, prior to 1906, you did not use the J bar C?

A. Yes.

Q. How old were these cattle in 1918? Were they branded before your father died? A. Yes.

Q. They were old cattle? A. Yes.

Q. 12 years say or older?

A. Yes, older than that, some of them 20 years.

Q. Is it your best recollection that after the time of the death of your father in 1906 and this year 1918 that you didn't brand any cattle with the J bar C brand? A. Yes.

Q. You used your own brand?

A. Used my own brand.

Q. These 20 odd head that you say were on the ranch with the [99] J bar C brand in March of 1918, did they belong to you?

A. Well, I claimed them and the Huntington & Diamond Valley Land & Stock Company claimed them. Just a minute—when this settlement was made, I asked Herman Sadler, "What are you going to do with those cows? and he said, "You take them."

(Testimony of Edgar A. Sadler.)

Q. Referring to these old cows?

A. He said, "You take them. You have done enough staying on that dang ranch, or whatever you want to call it, and paying everything. You are entitled to them."

Q. That is Herman Sadler, the agent and attorney in fact for the Huntington & Diamond Valley Company?

A. Yes.

Q. Where did that arrangement or talk take place?

A. Down here.

Q. Here in Reno?

A. Yes.

Q. Who else was present, if any one?

A. There was nobody there. There were a lot standing around there but I don't know who they were.

Q. The dispute as to whom those cattle really belonged to continued on down to the time you and Herman Sadler had this talk, is that right?

A. Yes.

Q. And after that was there any further dispute?

A. No, no dispute. [100]

Q. You took the cattle?

A. That is right, I took the cattle.

Q. Now you gave a chattel mortgage on your quarter circle brand cattle and also these J bar C cattle?

A. Yes.

Mr. Thompson: That is objected to. The written instrument is the best evidence. We move the answer be stricken.

The Court: You can answer that question yes

(Testimony of Edgar A. Sadler.)

or no. If you are going into the subject of mortgage or anything of that kind, you should produce the instrument.

Mr. Cooke: All right.

Q. I show you what purports to be a chattel mortgage dated March 2, 1918, between Edgar Sadler and Alfred Sadler and the Washoe County Bank and ask you to look at that and state if you remember executing that document.

A. Yes, that's all right.

Q. You remember the document, do you?

A. Yes, I remember it.

Q. That is your signature there?

A. Sure.

Mr. Cooke: We ask that it be marked for identification.

The Court: It will be so marked, Defendant's Exhibit A. [101]

Q. Defendant's Exhibit A, you note the description of the cattle——

Mr. Thompson: We object to the witness testifying about something that isn't in evidence, from an instrument that isn't in evidence.

Mr. Cooke: It is preliminary for making the offer.

The Court: I think he can state whether or not he notices that matter. Objection will be overruled.

(Question read.)

Q. ——given in the document?

The Court: You can answer that yes or no.

A. Yes.

(Testimony of Edgar A. Sadler.)

Mr. Cooke: We offer the document in evidence.
Mr. Thompson: No objection.

The Court: It may be admitted in evidence as Defendant's Exhibit A.

Q. In Defendant's Exhibit A the cattle are described as 50 head cattle branded C J on right hip. Is that the same bunch of cattle that you referred to a moment ago as 20 head?

A. Yes sir.

Q. Were there as many as 50 head, as a matter of fact?

A. I don't know, never counted them.

Q. Well you now testify that there were some 20 head? A. Yes. [102]

Q. When did you ascertain there were 20 head instead of 50 as mentioned in the chattel mortgage?

A. I counted them in the fall.

Q. The fall of that same year? A. Yes.

Q. Who was with you when you counted them?

A. Well, I don't know, three or four men work-in there. Mr. Eccles, he was there representing——

Q. In the talk you had with Herman Sadler you have already told us about, where he told you to take the J bar C cattle that you testified, was any particular number mentioned? A. No.

Q. Did that arrangement between you and Herman J. Sadler, as you understood it, include all of the J bar C cattle that were there? A. Yes.

Q. The 200 head of cattle branded interlocking quarter circle or half circle on the right hip, I think you told us that was your brand and those were your cattle? A. Yes.

(Testimony of Edgar A. Sadler.)

Q. When did you acquire those?

A. Before 1906.

Q. How long before 1906 did you start in buying cattle or acquiring cattle for yourself? About as near as you can tell us? [103]

A. I wouldn't know what the date was.

Q. I understand, but give us your best judgment as to about the time. Your father died in 1906. About how many years before he died?

A. Three or four years.

Q. About 1900 then?

A. Somewhere along there.

Q. And this brand, I think you told us when you first acquired that——

A. If you have the mortgage on them cattle you can find out right away when I bought those cattle.

Q. Well, you mean this same document I showed you a moment ago?

A. No, no, another one.

Q. Well, you are giving us your best recollection now? A. Yes.

Q. This iron, this quarter circle iron, was that an original iron with you or did you buy it from somebody else?

A. No, I didn't buy it.

Q. You just had it made?

A. No, I didn't have it made.

Q. How did you get it?

A. It jused to be used on the Diamond Ranch, oh long before I come there, and it was thrown away and I just picked it up and used it.

(Testimony of Edgar A. Sadler.)

Q. Do you remember when, if at all, you had it registered? [104]

Mr. Thompson: Objected to, I think the record is the best evidence of that, your Honor. He can obtain that record from the registry office.

The Court: The objection will be overruled. You may answer the question.

Q. About when, if you recall, did you have it registered first?

A. Oh, 1920, somewhere along there.

Q. 1920? A. Yes.

Q. Is that the first registration, as far as you know? A. Yes.

Q. You understand the rule and law in regard to re-registereing every five years?

A. Oh, yes, every five years.

Q. Then you just picked this brand up and used it from some time about 1900 down to 1920 before it was actually registered, is that true?

A. Yes.

Q. And you registered with the county recorder at—— A. Eureka.

Q. The J bar C cattle that you have referred to and the interlocking quarter circle, 200 head that you mentioned, were they all running together on the same ranch? A. Yes sir. [105]

Q. All co-mingled together, were they?

A. Yes sir.

Q. You have told us on cross-examination something about several trips that Clarence Sadler made to the ranch, once I think, in 1925 or so and another

(Testimony of Edgar A. Sadler.)

one in 1938. Were those the only occasions that he was on the ranch, say from 1918 to the present time?

A. I think so.

Q. And when he was out there in 1938 he was there on a hunting trip, as you recall it?

A. Yes sir.

Q. And there was some man with him?

A. Yes sir.

Q. Can you give the name of that man?

A. No, I don't know the name.

Q. Can you identify him in any way at all?

A. No, he was a man that worked with Clarence in his office.

Q. In San Francisco?

A. Yes, San Francisco.

Q. From whom or in what way did you learn that?

A. That is what he said.

Q. Who said it?

A. The man that was there.

Q. And was he there on a hunting trip too?

A. Yes. [106]

Q. They came and left together?

A. Yes.

Q. Did they do any hunting there that you know of?

A. Yes, they went out and hunted but never caught anything.

Q. That is the usual experience.

A. Had another man go out and shoot a deer for them.

Q. How long did they stay?

A. Three or four days.

(Testimony of Edgar A. Sadler.)

Q. Where did they stay while they were there?

A. Right at the house.

Q. At your house? A. Yes.

Q. Did you have a discussion with Clarence more than once during that two or three days he was there, in regard to the ranch or its operation?

A. No, I think only once.

Q. When was that with reference to the time that he landed there? Was it some time after, or just before he left?

A. Oh, a day or two after.

Q. Who was present at that conversation?

A. My wife was there.

Q. Anybody else?

A. I don't know. I don't think so.

Q. Either of your sons there or their wives?

A. I don't think so. Floyd's wife might have been there, I [107] don't know.

Q. Well, that is your best recollection any way?

A. Yes. I don't think there was anybody there but myself and my wife.

Q. Yourself and your wife and Clarence?

A. Yes.

Q. How did the matter of the ranch first come up? Just tell us as nearly as you can recall what was said and who it was that said it. Give us as near as you can recall. I realize you can't give it exactly or anything of that sort.

A. Well, we were just talking there and then he asked me what we were going to do with the ranch and I told him——

(Testimony of Edgar A. Sadler.)

Q. What were you talking about?

A. Oh, different things I guess.

Q. Well, was it about the ranch or politics?

A. Oh, about mining and everything.

Q. And then as you remember it he abruptly asked you what you were going to do about the ranch?

A. Yes.

Q. And you said what?

A. I told him he didn't have nothing to do with the ranch.

Q. What did he say to that?

A. He said he was going over to my nephew's and find out about it.

Q. Your nephew's name is what? [108]

A. Edgar Lane Plummer.

Q. Do you know whether he went to see the nephew or not?

A. He never went.

Q. Was that all you can recall now that was said in regard to the ranch and its operation?

A. Yes, that's all.

Q. Now on the other occasion, which was in 1925, as I believe you stated, or as near as you can recall, is that right?

A. Yes.

Q. What was his business out there then, so far as you know?

A. Just a visit, I guess, that's all.

Q. He didn't go hunting on that occasion?

A. No.

Q. Nobody was with him?

A. His wife.

Q. How long did they stay there?

A. Two or three days.

(Testimony of Edgar A. Sadler.)

Q. At the ranch? A. Yes.

Q. And you all stayed there together and ate at the same table, etc.? A. Yes, sure.

Q. When did the discussion about the ranch or its ownership first come up on that occasion? How long after he arrived there? [109]

A. Oh, it might have been a day or two, somewhere along in there.

Q. Where did it take place?

A. At the ranch.

Q. I know, but the ranch is three thousand acres. A. In the house.

Q. Who were present in the house at the time the talk was had?

A. I think my wife was there.

Q. And anybody else?

A. I don't think so.

Q. Was Clarence Sadler's wife there?

A. Oh yes, she was there.

Q. And how did the discussion or talk in regard to the ranch or its ownership or Clarence having any interest in it or the like, how did that start?

A. Well, I don't know how it started.

Q. Tell us, as near as you can recall, what was said, the substance of it.

A. Well, just said what we going to do with the ranch.

Q. About the same as in 1938? A. Yes.

Q. Do you remember what was said immediately preceding that, what led up to the question, "What are we going to do with the ranch?" Is that the way you recall it? A. Yes. [110]

(Testimony of Edgar A. Sadler.)

Q. And your answer was what?

A. He didn't have nothing to do with it.

Q. The talk on both occasions was practically the same?

A. Yes, about the same.

Q. When you told him he didn't have anything to do with it, what did he say?

A. He didn't say nothing.

Q. Was that subject renewed in any way at all after that during that visit?

A. No.

Q. What was he doing out there for these three days? He wasn't hunting, what was he doing?

A. Visiting around.

Q. Visiting around with anybody beside your family?

A. Well, I think he went over to Plummer's.

Q. Where do the Plummer's live?

A. Over in Pine Valley.

Q. The Plummers were relatives?

A. The boy is my nephew.

Q. And the son of Wilhelmenia, your sister, is that right?

A. Yes.

Q. How far did the Plummers live from your place?

A. About 23 or 24 miles, something like that.

Q. Did Clarence and his wife on that occasion spend most of the two or three days' time visiting with you or the Plummers? [111]

Mr. Thompson: We object, your Honor. He is asked to testify to something he doesn't know. He said, "I think they went over to the Plummer's"

(Testimony of Edgar A. Sadler.)

and obviously he can't know if they were at the Plummers, if they were at his house.

Q. You said something about his visiting at the Plummer's. Do you know he was visiting there?

A. Sure, I know.

Q. How much time did he spend at Plummer's compared with the time he spent with you?

A. Well, he didn't stay there long. Went over in a day and came back the same day.

Q. That is at the Plummer's? A. Yes.

Q. You have been at the ranch, this Diamond Valley Ranch that we have been talking about, continuously since 1918 and for that matter a long time before that, have you not? A. Yes, sir.

Q. You have already told us about that. I think you told us on your so-called cross-examination, but let me ask you this—these two visits of Clarence Sadler out there that you just told us about in 1925 and one in 1938, were they the only occasions that he was on the ranch, so far as you know, we will say subsequent to March, 1918? A. Yes, sir.

Mr. Thompson: He testified to that other occasion, [112] Mr. Cooke.

Mr. Cooke: I don't think so. He said two visits, is that right? A. That is right.

Q. 1925 and 1938?

Mr. Thompson: He also testified to 1922.

The Court: As I understand the testimony, the 1938 visit mentioned in the answer, he testified in regard to that that that takes the place of his testimony of the 1925 visit. There was a visit in 1922.

(Testimony of Edgar A. Sadler.)

Mr. Cooke: I didn't understand that.

The Court: In other words, the transactions which he testified to in the first instance as having occurred in 1925, he later stated those things occurred in 1938 and not 1925.

Q. Well, let us see if we can get that straightened, Mr. Sadler. You remember on your cross-examination you testified something about that he was out there about 1922 and then you mentioned 1925. When he was out there hunting, and then you remembered it was in 1938 he was hunting.

A. I don't think he was out there in 1922. I know he wasn't.

Q. Now is it then your best recollection that it was only 1925 and 1938? [113]

A. '25 and '38 he was also out there.

Q. Those were the two occasions?

A. Yes, those two occasions.

Q. Whether those are the exact years or otherwise, there were only those two occasions since 1918 he was there? A. Yes.

Q. And you were there yourself all the time?

A. Yes.

Q. Now counsel asked you if you knew of the claim of Minnie C. Sadler for some 19 or 20 thousand dollars against Reinhold Sadler and you told him you knew something about it. What is it that you know about that claim?

A. Well, she put in a claim and she got her money, I guess, that's all I know about it.

(Testimony of Edgar A. Sadler.)

Mr. Thompson: We move the answer be stricken on the ground it is assumption.

The Court: The answer may go out.

Q. Tell us what you know about it.

A. Well, all I can recollect the thing was put in and my mother OK'd it and she got her money.

Q. In that claim reference is made to some 1990 odd shares of stock of the Huntington & Diamond Valley Land and Stock Company. Do you know anything about those shares of stock or what happened to those?

A. Well, those shares of stock were transferred over from my [114] father to those people in San Francisco.

Q. Those people?

A. Mrs. Minnie Sadler, the Sadlers down there.

Q. Did your father ever get it back, so far as you know?

A. No, I don't think he ever got it back.

Q. Do you know what happened to the stock, ever sold or what?

A. Well, what I remember, the Bank of California, they had a loan there and they, I guess it was foreclosed, and put the stock up at auction for sale and Minnie C. Sadler bought it in.

Mr. Cooke: Of course, we have a lot of other questions we can ask the witness at this time, but I think it will probably be better on our own case, your Honor.

The Court: Any further questions of this witness at this time?

(Testimony of Edgar A. Sadler.)

Recross-Examination

By Mr. Thompson:

Q. Mr. Sadler, isn't it a fact that that claim that Minnie C. Sadler filed against the estate of Reinhold Sadler for a sum in excess of 19 thousand dollars was rejected by your mother as administratrix?

A. No.

Q. Do you know that?

A. I think that she approved it.

Q. Are you as sure of that as you are of your other testimony in this case?

Mr. Cooke: I object to that. [115]

The Court: Objection sustained.

Q. Do you know that your mother approved that claim?

A. Yes.

Q. You do? A. Yes.

Mr. Thompson: That's all.

Mr. Cooke: That's all.

MRS. KATHRYN SADLER

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. My name is Kathryn Powers Sadler.

Q. And you are the widow of Alfred Sadler?

A. I am.

(Testimony of Mrs. Kathryn Sadler.)

Q. You are also the appointed and acting administratrix of his estate, are you not?

A. I am.

Q. Where do you live, Mrs. Sadler?

A. 527 Washington Street, Reno, Nevada.

Q. On what date did your husband, Alfred Sadler, die? A. March 5, 1944.

Q. Were you living at 527 Washington Street in Reno at that time? A. Yes, I was. [116]

Q. Shortly after the death of your husband, Alfred Sadler, did you examine his personal effects?

A. I did.

Q. And who assisted you at that time?

A. My daughter, Helen Payson.

Q. I show you Plaintiff's Exhibit 8, Mrs. Sadler, have you seen that before? A. I have.

Q. And when did you first see it?

A. When I was looking over the papers and my daughter was helping me and she found this particular paper.

Q. Where were the papers located that you were looking over?

A. They were in a satchel. Alfred always kept all these documents in a clothes press off from our bedroom.

Q. And you and your daughter Helen took the papers out of the satchel and you found Exhibit 8 among them, is that correct? A. Yes.

Q. Do you recognize the handwriting on Exhibit 8?

A. I do. That is Alfred's handwriting.

(Testimony of Mrs. Kathryn Sadler.)

Q. The body of the letter?

A. The body of the letter.

Q. I call your attention to Alfred Sadler, the signature at the bottom of that agreement, Exhibit 8, in whose handwriting is that?

A. That's Alfred's [117]

Q. I call your attention to the signature Edgar Sadler at the bottom of the agreement. Exhibit 8, do you recognize that signature? A. Yes, I do.

Q. And whose signature is it?

A. Edgar's.

Mr. Cooke: Just a moment. I object on the ground no proper foundation has been laid.

The Court: I think that is true.

Mr. Thompson: I will withdraw the question.

Q. Mrs. Sadler, how long have you know Edgar Sadler?

A. I have known him since 1925.

Q. And during that period of time have you had occasion to see letters coming in the mail from Edgar Sadler? A. Yes, I have.

Q. And approximately how many such letters have you seen? A. Well——

Q. Would there be many letters or just a few?

A. A few.

Q. A few each year? A. Yes.

Q. Approximately how many each year?

A. Well, maybe two or three.

Q. Did you see Edgar Sadler's signature to those letters? A. Yes, I have [118]

Q. Are you familiar with his signature?

A. Yes.

(Testimony of Mrs. Kathryn Sadler.)

Q. In your opinion in whose handwriting is the signature "Edgar Sadler" at the bottom of Exhibit 8?

Mr. Cooke: Objected to on the ground no proper foundation laid.

The Court: Objection overruled. You may answer the question.

Q. The signature of Edgar Sadler, in whose handwriting is that, in your opinion?

A. That is Edgar's signature.

Q. I show you Plaintiff's Exhibit 20 for identification, Mrs. Sadler, where did you see that before?

A. That was among the papers in Alfred's satchel.

Q. This Exhibit 20 was among the papers you found in the satchel? A. Yes, it was.

Q. Were there other papers in the satchel, too?

A. There were a good many papers.

Q. Do you recall the character of any of them, that is, what type of papers they were?

A. Well, they were all pertaining to the ranch.

Q. What ranch do you refer to?

A. Diamond Valley Ranch, Eureka, Nevada.

Mr. Thompson: You may cross-examine. [119]

Cross-Examination

By Mr. Cooke:

Q. Mrs. Sadler, I understood you to testify that your daughter found this particular document, that is Exhibit 8 that counsel showed you, that she found that particular paper or document first, is that right?

(Testimony of Mrs. Kathryn Sadler.)

A. She was with me, yes, she found it in the satchel.

Q. She was the first one that saw it, is that right?
A. Yes, she was.

Q. This satchel contained, you told us, quite a number of papers?
A. A good many.

Q. Some related to the ranch and some other, I suppose?

A. Well, all of them related to the ranch.

Q. How many papers were there in that satchel?

A. Well, I couldn't say how many.

Q. Can you give us any idea of the approximate number?

A. I don't believe I could because there were so many.

Q. Well, would you say a hundred or a thousand or anything of that sort?

A. I would say there was a hundred or over.

Q. Did he have any other papers besides this particular sack or satchel?

A. Not that I know of.

Q. That was the only assortment of papers?

A. Yes. [120]

Q. Pertaining to his affairs that you found?

A. Yes.

Q. And they all related to this ranch?

A. Yes.

Q. You examined them and read them all over, did you?
A. I read most of them over.

Q. And those papers are still extant, I suppose, they are still in your possession?

A. In Mr. Kearney's possession.

(Testimony of Mrs. Kathryn Sadler.)

Q. The lawyer, Wm. M. Kearney?

A. Yes, except the one on exhibit.

Q. He is your attorney in the administratrix proceeding?

A. He is.

Q. He has the whole sack, is that right, or just this one paper?

A. He has some papers and I have some and there are some here on exhibit.

Q. Some that came out of that sack?

A. Yes.

Q. Aside from Exhibit 8, which was the paper counsel showed you, do you recall any other papers that came in here as exhibits that were in that sack or satchel?

Mr. Thompson: Objected to, if your Honor please, because I am sure the witness does not know what papers are on exhibit here. I suggest that Mr. Cooke show her the papers. [121]

Mr. Cooke: I don't think that I have to do that.

The Court: We will go along a little further on this and see what develops. Objection overruled.

Q. Can you answer the question, Mrs. Sadler, as to what other papers went in as exhibits here that came from that sack or satchel?

A. All these papers that have been exhibited.

Q. They came from that sack?

A. They did.

Q. Did you ever see Edgar write his name?

A. No, I don't think I have seen him write his name.

(Testimony of Mrs. Kathryn Sadler.)

Q. All you know about his signature is that letters came to you from him? A. Yes.

Q. And there was the name of Edgar or Edgar Sadler at the bottom? A. Yes.

Q. You inferred that they must have been signed by him? A. Yes.

Mr. Cooke: I think that is all.

Mr. Thompson: That is all, Mrs. Sadler. [122]

MR. CLARENCE SADLER

the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name, please?

A. Clarence T. Sadler.

Q. You are the plaintiff in this case, Mr. Sadler? A. I am.

Q. Where do you live?

A. 566 The Alameda, Berkeley, California.

Q. How long have you resided in Berkeley, California?

A. Since approximately, well, since 1927.

Q. Are you married? A. I am.

Q. What is your wife's name?

A. Doris Reba Sadler.

Q. By what name is she commonly addressed?

A. As Reba.

Q. That is R-e-b-a?

A. That is correct.

(Testimony of Mr. Clarence Sadler.)

Q. When were you married?

A. November 4, 1922.

Q. When were you born?

A. May 24, 1891.

Q. Where were you born?

A. Eureka, Nevada. [123]

Q. You are a brother of Edgar Sadler, the defendant in this case? A. I am.

Q. Where were you in the latter part of the year 1917?

A. The latter part of the year 1917 I was in the army.

Q. And where were you stationed at that time?

A. Well, the latter part of 1917, in September, I was called to Princeton in the aviation section around their ground school and following my graduation from Princeton we went to a field outside of Hempsted, New York, and were stationed there until the first part of 1918, when we were transferred to Gershner Field, Louisiana, for flying.

Q. I show you Exhibit 3, Mr. Sadler, Plaintiff's Exhibit 3, which is a power of attorney from you to Alfred Sadler, is that your signature on that exhibit? A. It is.

Q. Prior to March 2, 1918, or at any time, did you revoke this power of attorney?

A. I did not.

Q. Was it still in effect during the year 1918 and during all of that year?

A. It was in effect until the date of my brother's death, March 5, 1944.

(Testimony of Mr. Clarence Sadler.)

Q. Where were you during the first part of the year 1918?

A. The first part of the year 1918 I was stationed at Gershner [124] Field, Lake Charleston, Louisiana, camp near Lake Charleston, Louisiana.

Q. I show you Plaintiff's Exhibit 21 for identification, do you recognize that exhibit?

A. I do. I received this through the United States mail from Mr. Henderson, attorney at law, Elko, Nevada, in the latter part of January, 1916.

Q. And where were you at that time?

A. I was in Washington, working at the United States Senate.

Q. Was there anything enclosed in that letter at the time you received it?

A. There was. It is a copy of the complaint filed by the Huntington & Diamond Valley Land & Stock Company against the heirs of Reinhold Sadler, including myself.

Mr. Thompson: I offer the letter in evidence, your Honor.

Mr. Cooke: The offer is objected to, if the Court please, on the ground that it purports to be a communication from one C. B. Henderson to Clarence Sadler, Washington, D. C., enclosing, foreshadowed by counsel's question, a copy of the complaint in the quiet title suit, I presume, the one brought in 1915, this being dated January 22, 1916. It is not connected in any way with the defendant in this case and Mr. C. B. Henderson has no connection with the case, so far as the defendant is concerned. He was attorney for the Huntington Company [125]

(Testimony of Mr. Clarence Sadler.)

in that suit, so that by no practice I am familiar with can this be used as being evidence in support of or against Mr. Edgar Sadler.

The Court: What is the theory?

Mr. Thompson: Purely preliminary, your Honor. It shows that Mr. Clarence Sadler was notified of the commencement of the quiet title action and will be followed by testimony of other correspondence.

Mr. Cooke: It is immaterial.

The Court: Well, it will be admitted in evidence for the purpose stated, Exhibit 21.

PLAINTIFF'S EXHIBIT No. 21

Charles B. Henderson

Attorney at Law

Elko, Nevada

January 22, 1916.

Mr. Clarence Sadler,

Washington, D. C.

c/o Congressman E. E. Roberts.

Dear Sir:—

I inclose herein a certified copy of complaint and summons in the case of Huntington and Diamond Valley Stock and Land Company vs. The Huntington Valley Stock and Land Company, et als., being a suit recently brought here by the plaintiff corporation to quiet title to certain land in Eureka, White Pine and Elko Counties. I inclose with this

(Testimony of Mr. Clarence Sadler.)

certified copy of complaint and summons, an appearance, together with stipulation granting you forty days' time to plead to the complaint. If agreeable to you would you sign the stipulation and appearance and return to me in order to avoid the unnecessary costs of publication of summons. If, however, it is not agreeable I wish you would please return the certified copy of Complaint and Summons, together with the stipulation and I will proceed to get service by publication. If the time granted herein is found not to be sufficient I would be willing to grant reasonable additional time in view of your absence. However, I imagine that Mr. Edgar Sadler will appear as he has been served and, no doubt, make the necessary arrangements for most of the defendants.

I am making this request, simply to save as much of the costs in the matter as possible as I am not disposed to cause any of the parties to this suit any unnecessary expense in the matter.

Very truly yours,

/s/ C. B. HENDERSON.

H/W.
inc.

[Endorsed]: Filed Oct. 15th, 1946.

Q. Mr. Sadler, at about the same time that you received Exhibit 21, did you receive another letter?

A. I did. It was——

(Testimony of Mr. Clarence Sadler.)

Q. Just a minute. In whose handwriting was that letter?

A. Mr. Alfred R. Sadler's, my brother at Reno, Nevada.

Q. By whom was it signed?

A. Signed by Alfred R. Sadler.

Q. Do you now have that letter?

A. I have not.

Q. What did you do with it?

A. It was destroyed when I was ordered overseas.

Q. About when was that?

A. In the latter part of the summer of 1918.

Q. And about when was it that you received this letter from [126] Alfred R. Sadler?

A. Well, as a matter of fact, I think I received it a few days prior to the time I received this letter from Mr. Henderson. Inasmuch as I was no longer connected with Mr. Roberts at the time—Mr. Henderson addressed his letter to Congressman Roberts and it took time for the letter to get to my residence address. It was forwarded afterwards by Mr. Roberts' office to me.

Q. Do you recall the substance of the statements contained in the letter from Alfred R. Sadler?

A. I do.

Q. What were they?

Mr. Cooke: Objected to as irrelevant and incompetent. No evidence to establish or tend to establish a claim from Edgar Sadler against Clarence Sadler. It is hearsay. There is nothing binding on Ed-

(Testimony of Mr. Clarence Sadler.)

gar Sadler. One co-tenant cannot make representation binding upon his co-tenant and that is all this purports to be.

The Court: Objection will be overruled.

A. In the letter it stated that suit had been filed by the Huntington & Diamond Valley Land & Stock Company against the heirs of Reinhold Sadler and others and that a copy of the complaint would undoubtedly be served on me.

Q. Did he say anything—

A. (Interrupting): He also mentioned the fact that he was [127] making arrangements to employ the firm of Cheney, Downer, Price & Hawkins, or that the arrangement had been completed, to represent us in the suit, that is, the heirs of Reinhold Sadler.

Q. In June of 1916 what did you do?

A. In June of 1916 I returned to Nevada.

Q. And how long did you remain in Nevada?

A. I remained until after the election was over, some time in the latter part of 1916, when I returned to Washington to resume my position.

Q. At that time did you have any discussion with Alfred R. Sadler regarding the quiet title suit?

A. I had several discussions with him. I think one time I discussed it with Alfred in the presence of Mr. Cheney.

Q. That was some time between June and December of 1916?

A. That is correct.

Q. Do you recall where that conversation took place?

(Testimony of Mr. Clarence Sadler.)

A. Well, it took place—you mean the Cheney conversation? It took place in Mr. Cheney's office. At that time I had all the ranch papers with me. I brought them over from Carson and Alfred and I kept them——

Mr. Cooke: Object to that as not responsive to the question. Move to strike.

The Court: I think that is true. That portion may go out. [128]

Q. What was the conversation at that time?

Mr. Cooke: Objected to as irrelevant and incompetent and hearsay. There must be some limit.

The Court: That is something rather serious, I think.

Mr. Thompson: Depends on what he means by hearsay.

Mr. Cooke: Defendant objects first on the ground it is hearsay, purports to be merely a talk between this witness and another party not our agent and not in any way authorized to speak for us, in any sense whatsoever. We object to it on the further ground that it is asking for testimony by this witness in regard to discussions and conversation with Alfred Sadler, since deceased, and would be in violation of statute 9066, I think, the so-called dead man rule.

Mr. Thompson: We withdraw the question, your Honor.

Q. When did you next leave Nevada, Mr. Sadler?

A. Well, I returned to Washington in the latter part of November or early December.

(Testimony of Mr. Clarence Sadler.)

Q. That is 1916?

A. That is correct, 1916.

Q. And thereafter did you receive any letters from Albert Sadler?

A. I did, a number of them.

Q. Do you recall a letter which you received in December, 1917, or January, 1918?

A. I do. [129]

Q. And in whose handwriting was that letter?

A. In the handwriting of Alfred R. Sadler.

Q. Was it signed by him? A. It was.

Q. Do you have the letter now?

A. I have not.

Q. Where is the letter?

A. It was destroyed at the time I was ordered overseas.

Q. Do you recall the substance of the contents of that letter?

Mr. Cooke: Just a minute. I wish to renew the objection.

Mr. Thompson: He can answer that yes or no, your Honor.

Mr. Cooke: All right.

A. Yes.

Q. Will you relate the contents of the letter?

Mr. Cooke: We object to that on the ground that this is calling for conversation of a deceased person. If the document were here, it could be put in evidence as testimony as to genuineness, we make no question of that, but the question of whether he

(Testimony of Mr. Clarence Sadler.)

received a letter from Alfred Sadler and the letter being not available so that we can view the handwriting to see its genuineness and the witness testify he got a letter from Mr. Alfred Sadler and Alfred Sadler said so and so, is purely within the rule forbidding testimony of a transaction by a witness with a person since deceased. [130] That same principle, I think, was involved in the case of *Bradley v. Allied L. & L. S. Co.*, decided by the Supreme Court of Nevada a few years ago, where the question of the receipt of a letter by the deceased was in issue there the same as here, and the argument was made and referred to by the Supreme Court that if the deceased were alive he could deny sending that letter, hence said the court, in effect, the witness being asked to testify to something that the deceased being able to deny if he had been alive, the case was within the statute. That is my recollection of it, but it would seem to me that purely based upon the statute itself, his offer here is inadmissible.

The Court: The only concern I have about it is the fact would it resolve itself into statement of what was stated by a person now deceased.

Mr. Thompson: Your Honor, I have no doubt Mr. Cooke has cited you correct facts, but the title is not correct. In fact the case is *Maitia vs. Allied Land & Livestock Company*, 49 Nevada 451. In that case the witness, Grand Miller, was permitted to testify that he had written, addressed and mailed a certain letter to a deceased person and a copy of the letter was admitted in evidence. The objection

(Testimony of Mr. Clarence Sadler.)

was made on the ground of the dead man statute and the Supreme Court held that the testimony was properly admitted because the test being that the deceased person, if he were alive to testify, could not have denied that Mr. Miller did write, address and mail a letter addressed to him as testified to by him, and he also testified that he received no reply to that letter. Now that is the holding in that particular case. However, the Nevada Supreme Court, in reaching that decision, cited and relied upon and quoted at length from the case of *Dillon vs. Gray*, 87 Kansas 129, 123 Pacific 878. That case involved a suit to enforce a trust on the assets of an estate. The assets were the proceeds of the sale of a farm which the deceased person had promised to devise to the plaintiffs if they would live on the farm and care for him. They did so for ten years. The proof of the contract consisted of the oral testimony of the receipt of two letters by the plaintiffs in the handwriting of the decedent, in which the offer was made. The letters had been lost and secondary evidence of their contents was admitted. The court said:

“The plaintiffs’ evidence showed that the letters, which were the only written memoranda of the contract, were not in existence. Secondary evidence was offered as to their contents. This evidence was competent, and abundantly supports the finding made by the court as to the substance of the letters and that a contract

(Testimony of Mr. Clarence Sadler.)

of the terms stated was in fact entered into. The facts in this case are very like [132] those in *Anderson vs. Anderson*, 75 Kansas 117, 88 Pac. 743, 9 L. R. A. (N. S.) 229. There the only memorandum of the contract was a letter which was lost, but the contents were proved by a person who had seen and read the letter several years before he testified.”

Now I call your Honor’s attention to Sec. 8964 of the Nevada Compiled Laws, which provides that: “Where the original of a document has been lost or destroyed secondary evidence of its contents is admissible.” Now we have proved the loss or destruction of this letter received from Alfred Sadler. The test is whether Alfred Sadler, if he were alive, that is the test under the dead man statute, whether Alfred Sadler, if he were alive could deny the statements made by Clarence Sadler. Here is what he states. He states he received a letter through the United States mails, that in his opinion that letter was in the handwriting of Alfred Sadler. If we had the letter present, your Honor, that letter would be admissible. Mr. Sadler could identify the handwriting and we could offer the letter in evidence. Now the only problem involved is, is secondary evidence of a letter admissible? The dead man statute is taken care of and Mr. Sadler in this case——

The Court: Here is the thought that runs through my mind. It does not apply at all to this case or any of the parties that concern this case.

(Testimony of Mr. Clarence Sadler.)

What nicer way or more subtle way of avoiding the rule against testimony of statements of deceased persons than to have a case presented by a witness who is not at all too concerned with the truth, testify that at a certain time a letter was received from him that contained a certain statement. Isn't that one of the things that the statute was designed to prohibit?

Mr. Thompson: I do not believe so, your Honor, for this reason: the statute itself is fundamentally an enabling statute. The statute eliminated the common law disqualification of a party as a witness. At common law a party to the action couldn't testify at all. Mr. Sadler couldn't testify. Now the purpose of the statute is to eliminate the disqualification of a party. Then they put an exception in there which was not an exception at common law, that a party to the action is incompetent to testify to a transaction with a deceased person. Now the Supreme Court of the State of Nevada has held that that exception should be strictly construed, that the purpose of the exception is to prohibit the establishment of false and fraudulent claims against the estate of deceased persons. Of course, our statute is broader than the average statute dealing with that subject matter because it has the special section that a party is incompetent to testify to a transaction with a deceased person, but I have pointed out that the Supreme Court, [134] in the case of *Maitia* against *Allied Land & Livestock Company*, rely on the case of *Dillon vs. Gray*, which is a direct

(Testimony of Mr. Clarence Sadler.)

holding in our favor that secondary evidence of this letter from a deceased person is admissible. Now I have their holdings to the same effect, if your Honor would like to hear them.

The Court: Let us take that up later at 2:00 o'clock this afternoon. The court will be in recess until 2:00 o'clock this afternoon.

(Recess taken at 12:00 o'clock.)

Afternoon Session, October 15, 1946, 2:00 P.M.

Appearances the same as at morning session.

Clarence Sadler resumed the witness stand.

Mr. Thompson: I have the other authorities for your Honor.

The Court: Yes, I would like to get some information on this point. Now in regard to the authorities that you have already mentioned, that 123 Pac. 878, you made a statement from that case that the matters there testified to were matters which the decedent, if alive, could not deny.

Mr. Thompson: That is right, your Honor. [135]

The Court: Now how about this instance, as far as that part is concerned. If the testimony of Mr. Clarence Sadler, in response to this question, was that the deceased stated certain facts and related the facts stated in the lost letter, wouldn't that be the testimony of something that the deceased might deny if he were alive? Supposing the deceased were alive and a letter alleged to have been written by him was also alleged to have been received and lost and secondary evidence was introduced as to its

(Testimony of Mr. Clarence Sadler.)

contents, couldn't the person who it was claimed wrote that letter take the stand and deny that he wrote such a letter?

Mr. Thompson: That is right, your Honor. The same thing is true if the letter were present. If we had the letter which Alfred Sadler wrote to Clarence Sadler and Alfred Sadler is now dead and Clarence Sadler testified that he received the letter in the mail and that in his opinion it is the handwriting of Alfred Sadler, the letter would be admitted under the decisions of our own Supreme Court. Now if Alfred Sadler were alive, he could deny that he wrote that letter, but he cannot deny the testimony of Clarence Sadler that in Clarence Sadler's opinion that letter was in the handwriting of Alfred Sadler and there is the distinction on which this rule for admissibility [136] of that evidence is based. Now when you get that far, the only other subject is production of secondary evidence and that is provided for when the original is proved to be lost or destroyed.

The Court: Before you launch into your argument, I would just like to suggest to you a point about which I am in doubt. This statute is 8966: "No person shall be allowed to testify when the other party to the transaction is dead." That is the only part of that statute that is applicable to this situation, isn't it?

Mr. Thompson: That is right, your Honor.

The Court: Then the question arises, is Mr. Alfred Sadler, the deceased person, another party

(Testimony of Mr. Clarence Sadler.)

to this particular transaction involved here? What is the transaction we are interested in here and isn't Mr. Alfred Sadler another party to that transaction? That is another question.

Mr. Thompson: I think as I understand the decisions of our Supreme Court, your Honor, the transaction specified in the statute is not limited to the subject of the action itself, the particular contract or agreement. Under the case of Forsythe vs. Heward, for example, the Court laid down a broad definition of a transaction to include any negotiations or [137] dealings with a deceased person and I think we would be bound by that interpretation of the section, and as I understand it, under that interpretation a communication by letter from one person to another is a transaction just as a conversation is.

The Court: So then this subdivision 1 of this section is applicable here.

Mr. Thompson: I believe it is applicable, your Honor, but I believe that the testimony in the form presented as we offer it is not objectionable under that section, because the court has laid down, as a rule of demarcation whether the deceased person could deny the testimony of the witness and we are not offering anything which Alfred Sadler, if he were alive, could deny.

The Court: I might state that during the recess I read that Kansas case and there is a case cited in there where admission of testimony was allowed, but

(Testimony of Mr. Clarence Sadler.)

in the opinion there is a citation to the effect that the contents of the letter were not given. Now that is *Bryan v. Palmer*, 111 Pac. 443, cited 123 Pac. 878.

Mr. Thompson: Yes, but the principal case itself, *Dillon vs. Gray*, is a case in which oral testimony as to the contents of lost letters by a deceased person was permitted.

Mr. Cooke: Mr. Thompson, may I ask you a question?

Mr. Thompson: Yes.

Mr. Cooke: Have you discovered any difference between the Kansas statute and the Nevada statute on this?

Mr. Thompson: I can't answer that because I don't know the exact provisions of the Kansas statute, but I point out in the Nevada case, *Maitia against Allied*, this case of *Dillon vs. Gray* was cited as principal authority for the ruling in that case in interpreting the Nevada statute.

The Court: Now will you just go over again the *Dillon vs. Gray* case so that we can make sure that the contents of the letter was there disclosed or allowed to be introduced.

Mr. Thompson: Well that case, your Honor, was an action to enforce a trust for the benefit of the plaintiff on the assets of a decedent's estate. The assets of the estate were shown to be the proceeds of the sale of a farm that the deceased person had owned. The plaintiffs claimed that about ten

(Testimony of Mr. Clarence Sadler.)

years previously the decedent had written them some letters—they were residing in another state—requesting them to come and live on the farm and take care of it and take care of him and promising if they did so they would have the farm upon his death, the decedent's death. The evidence showed that this couple, man and wife, did move from the state where they were living to the farm of the decedent and lived with him and cared for him for those ten years, until his death. Now in order to establish the contract, the plaintiffs offered their own testimony as to the contents of the letters which the deceased had written to them in the first place, in which he promised to give them the farm if they would come and take care of him and the court admitted that evidence. I will read another paragraph from the opinion, your Honor, one that I didn't read this morning. The court said:

“There is nothing substantial in the claim that the court erred in permitting the plaintiffs to testify to transactions with the deceased in contravention to the statute. It was proper for Mrs. Dillon * * *”

She was one of the plaintiffs:

“* * * to state that they moved to the farm and resided there. The testimony did not relate to any personal transaction with Andrew Gray * * *”

(Testimony of Mr. Clarence Sadler.)

Andrew Gray was the deceased:

“* * * The Plaintiffs testified to the receipt of the letters addressed to them in Alabama, postmarked in Kansas, and that in their opinion the letters were in the handwriting of Andrew Gray. This was competent. If he had been living he could not have testified that plaintiffs did not receive the letters so postmarked, or that in their opinion the handwriting was not his. This is said to be one of the tests as [140] to whether or not the matter is a transaction within the statute.”

And then it cites some cases and then the other part of the opinion I read says that secondary evidence was offered to prove the contents of the letters, not the letters themselves.

The Court: Weren't the contents of those letters concerning a payment that was supposed to have been paid?

Mr. Thompson: Not as I read the case, your Honor. While we are waiting, your Honor, I might state some of these other authorities:

Williston vs. Williston, 41 N. Y. Supreme Court Reports Barbour's 635.

The court permitted an interested witness to testify to the contents of a lost letter which was in the handwriting of a deceased person. The court said:

“Suppose the letter had not been lost but had been produced upon the trial. There could not be a question as to its competency. The

(Testimony of Mr. Clarence Sadler.)

evidence of its contents upon admission of its loss is only another mode of producing the paper that it may speak for itself, in the same manner and with the same effect, that it would have done had the letter itself been present."

In the case of *Simmons vs. Havens*, 101 New York 427, 5 N. E., [141] the court held a party to an action could testify to the contents of a lost deed executed by the deceased person.

In the case of *Erwin v. Fillenwarth*, 160 Iowa 210, 137 N. W. 502, the court permitted an interested witness to testify that she had seen certain things in a box in the home of her deceased father and to testify to the contents of the box. As to competency of this testimony, the court said:

"* * * but it will be noted that nothing the witness testified to was of the communication or transaction with decedent. The box was on the table and was not shown to have been in the decedent's possession when he took it, nor does it appear that the witness examined the contents by permission or that the decedent handed the box to him for that purpose. He appears to have examined the contents on his own motion and the court rightly ruled that the testimony did not disclose a personal transaction or communication."

In the case of *Scott vs. Brenton*, 168 Iowa 201, 150 N. W. 56, it was held a party to an action against a municipality might testify as to the contents of a contract between himself and the dece-

(Testimony of Mr. Clarence Sadler.)

dent. The court observed that the burden was upon the parties objecting to the competency of the witness to show that the reading of the contract by the plaintiff was a personal transaction, unless it otherwise [142] appears from the circumstances.

“It is not shown that plaintiff’s mother was even present at the time he testifies he saw her signature and the contents of the writing. She may have left the house, or the contract may have been fully executed at some prior time at another place.”

From the facts of the case there was reason to assume that the witness could have obtained his knowledge after the transaction with the decedent had passed.

I have some other citations, but I do not have quotations from them, your Honor. It is our view, your Honor, that under the dead man statute the testimony which we seek to elicit from Clarence Sadler is admissible and competent. Your Honor has raised the point that that would be an obvious way of evading the dead man statute, but we suggest that that comment goes more to the weight which your Honor might give to such testimony than to its admissibility under these rulings and if the testimony so elicited fits in with the other testimony in the case, the other evidence, we assume that your Honor would give it credence; otherwise, your Honor might be at liberty to disregard it, but that objection pertains to the weight that your Honor would give to the testimony.

(Testimony of Mr. Clarence Sadler.)

Mr. Cooke: If the Court please, the question of admissibility of evidence cannot be disposed of by saying that [143] the evidence is admissible and the objection goes to the weight. It is either admissible or it is not. If it is admissible, then it is in here for all that it is worth, and if it is inadmissible, with the suggestion the court may consider it for what it is worth, etc., is not any solution at all. We used to have a justice of the peace in Tonopah, that your Honor may have known at one time. He wasn't very learned in law or anything else really and he did have some very serious tests down there and some of the questions before him would have probably puzzled a man on a higher bench, but this old judge, whenever any question came up that had to do with admission of evidence, he said "That goes to the weight of it and not admissibility" and made his ruling accordingly. That does not solve the question. I want to call your Honor's attention to facts in this matter it seems to me are worth considering. The Supreme Court in the Maitia case ruled, as we know, that Mr. Grant Miller, who was and still is in Reno, testified that he had sent a letter to Mr. Fairchild, who had previously been cashier of the Stock Growers Bank here and had in the meantime and before he died been appointed assignee for the benefit of creditors and Mr. Miller representing some of the creditors had occasion to send a communication to Mr. Fairchild and he testified that he wrote a letter, kept a carbon copy of it, and mailed it postpaid

(Testimony of Mr. Clarence Sadler.)

and that upon the left-hand corner of the envelope was return direction and the letter was never returned. [144] The objection was made that that was within the dead man's ruling but the Court said that the dead man, Mr. Fairchild, could not have denied that Mr. Miller wrote such a letter, could not have denied he had mailed it and could not have denied that carbon copy, couldn't deny there was that instruction upon the envelope, "Return in 5 days to A. Grant Miller," so that disposed of the objection. That was confirmed by the Supreme Court. Now the court did cite the Kansas case and a Wisconsin case and to my mind there is a difference in the provisions of the statute and that is why I called Mr. Thompson's attention to that. The Kansas statute reads differently from the Nevada statute.

The Court: Mr. Cooke, I don't want to interrupt. I see a distinction—I might be wrong in thinking, seeing a distinction in these two cases. Miller testified he mailed a letter and produced a carbon copy of the letter and that was admitted in evidence, wasn't it?

Mr. Cooke: Yes, over objection.

The Court: Here the difference is we may hear from the witness a statement of the contents of the letter. It is in effect testimony by a deceased person. Now then, the point that is bothering me is testimony on the part of Alfred Sadler, who would not be subject to cross-examination. [145]

(Testimony of Mr. Clarence Sadler.)

Mr. Cooke: No, there is no question about that. That is the vice of it and that is the danger of it.

The Court: As I understand these two cases, the Kansas case and the Maitia case, that point isn't at all covered by any of these cases.

Mr. Cooke: No, I don't think any of the Nevada cases has the same point we have here or the same factual situation, but in view of the fact that the Kansas cases have been urged upon the court, I wanted to call attention of the court that the Kansas statute provides differently from the Nevada statute, "No person shall testify in regard to a personal transaction." It is quoted in one of the opinions here, but that is the difference. In our statute that subdivision 1, there is no such provision. Now in a subsequent Kansas case, where they refer to Daniels, and this case counsel has cited, they discuss this question about the letter, and so on and the court says:

"It may be said that it was a communication or transaction, but was it personal in character as the statute provides?"

They accentuate the personal requirement of their statute, as distinct from ours, which does not contain anything of that kind.

"It was not written by Miller in the presence of the witness nor handed to her by him. When finished it passed from him to the possession of the post office [146] department, and

(Testimony of Mr. Clarence Sadler.)

it was obtained by the survivor Hoss from this intermediary. There was no personal touch between the parties when the letter was written or received. In limiting the disqualification to personal communications and transactions between one person and another, since dead, the legislative purpose evidently was that, when one of the parties is silenced by death, the other shall be silenced by law, thus placing both sides on an equality. One of the tests of exclusion applied is, could the deceased, if living, have denied the offered testimony? What occurred when the letter was received would have been outside his knowledge, and he could have given no testimony in contradiction of it."

Right there I might interpolate that if Alfred Sadler was alive and Clarence testifies what the contents were, no one could deny that Alfred Sadler could deny he wrote such a letter.

"To be personal * * * *"

The Supreme Court is continuing, refers to that personal requirement:

"To be personal the communication or transaction must have been made or had when the parties were face to face so that what was said or done in the presence of each other could not be related by one after the other [147] had died. A case quite closely in point, so close that it seems to be controlling, has been determined by that court. In *Bryan v. Palmer*, 83 Kan. 298, 111 Pac. 443, an action was brought by an

(Testimony of Mr. Clarence Sadler.)

administrator of the estate of King to recover on a note which defendant had given King. The defense was that the money had been enclosed in a letter in another state and forwarded by mail to King in his lifetime, and a receipt was enclosed with it for King to sign. At the trial after King's death, defendant testified as to the enclosing of the money in the envelope with the receipt, and taking of it to the postoffice, and also the receipt acknowledging payment of the money. It was held that the testimony was not prohibited by the statute since what was done and said by the defendant when he was hundreds of miles away could not be regarded as a personal communication or transaction. So here, Miller was not an immediate party to the transaction about which the testimony was given, had no personal knowledge of what was done by Hoss when she received and read the letter, and, if living, he could have given no evidence in contradiction of these facts."

And so on. Now the same is true as to Daniels against Foster, a Wisconsin case, which seems to be a more or less leading case, but this case, the Moore case, from which I am reading, [148] 240 Pac. at 853, I am reading from page 855 that refers to the Dillon vs. Gray case, which counsel has cited, and they go on to say:

"The letters, which were the only written memoranda of the contract, had been lost, and secondary evidence of their contents was given

(Testimony of Mr. Clarence Sadler.)

by the witness. The letters were received in Alabama, postmarked in Kansas, and he testified they were in the handwriting of the decedent. It was held that the testimony did not relate to a personal transaction * * "

Your Honor will note they are all the time talking about personal transaction which we are not concerned with at all.

"* * * that the decedent, if living, could not have testified the letters were not received or that in the opinion of the witness they were in his handwriting; and hence the testimony was held to be admissible."

Then refers to the Daniels case, Wisconsin:

"* * * * it was held that a defendant might testify that he received a letter purporting to have been written by the testator, that it could not be regarded as a communication or transaction had personally with the deceased, and therefore did not come within the prohibition of the statute."

Evidently Wisconsin had the same requirement that the transaction be a personal one, in a face to face transaction. [149]

"It was held that a personal transaction or communication means one made face to face by parties in the actual presence and hearing of each other, and, further, that the witness could testify that he was familiar with the handwriting of the deceased and that the letter was genuine."

(Testimony of Mr. Clarence Sadler.)

I submit that the Kansas cases, under that statute, are of no help to us.

The Court: Well in this Kansas case Mr. Thompson, that is cited in the first one that you read and that first case is a case exactly in point. I am reading from Dillon vs. Gray: "A case exactly in point is Bryan v. Palmer, 83 Kan. 296, 111 Pac. 443." That caused me to look up Bryan v. Palmer. Here is some of the testimony: "When by death, insanity or lunacy the lips of one party are closed, Sec. 3639 of the Code wisely closes the mouth of his adversary as to personal transactions and communications which the silent party might, through personal knowledge, deny, were he able to speak. Personal transactions and communications, as contemplated in the statute, are transactions and communications between parties, of which both must have had [150] personal knowledge." Then the court goes on dealing with the case at hand: "Some of the testimony relating to the preparations made for transmitting the money, and also of obtaining possession of the receipt, closely approach the border line of incompetency; but, considering the spirit and intent of the statute, substantially all of the testimony objected to was admissible. The witness, it is true, spoke of sending a letter to and receiving one from King * * *" King is the deceased person: "* * * and also stated that the letter received had been destroyed, but there was no attempt to show the contents of the letters. It may

(Testimony of Mr. Clarence Sadler.)

be said, too, that most of the challenged testimony was well supported by other testimony." So here we have a statute that contains this statement which, as I understand it, is conceded applicable here: "No person shall be allowed to testify when the other party to the transaction is dead." The testimony would have to deal with his transaction of sending and receiving of this letter. It seems to me perfectly proper that the witness could testify as to receipt of the letter and give his opinion as to the handwriting [151] being in the handwriting of the deceased, but the stumbling block in my mind is whether or not he can go further than that and show the contents of it.

Mr. Thompson: Well, I don't want to take time to repeat our views on that, your Honor. I think——

The Court: Isn't that in effect causing the deceased to testify here in court, of course without any opportunity of cross-examination. That isn't the idea of the statute. The idea is the opposite party to a transaction can not testify and the aim of the statute is, because the deceased would have no opportunity to deny that party's testimony as to the transaction. I am going to admit the testimony, with the understanding that counsel may urge the objection and offer any authorities he might find on the question.

Mr. Cooke: There is another ground, that it is hearsay as to us.

The Court: The only ground I am worried about is the one discussed. Objection is overruled as to

(Testimony of Mr. Clarence Sadler.)

both grounds, with the privilege of moving to strike and to reargue the point later on.[152]

Mr. Thompson: To save time, I will ask the question over again, your Honor.

Q. Mr. Sadler, you had testified that in January of 1918 you received the letter which was in the handwriting of your brother, Alfred Sadler, is that not correct? A. That is correct.

Q. And that that letter was destroyed when you were ordered overseas? A. That is correct.

Q. Will you please state the substance of the contents of that letter?

Mr. Cooke: I suppose we are required to renew our objections to keep the record straight.

Mr. Thompson: We will stipulate the objection goes to this question.

Mr. Cooke: And same ruling and same exception.

The Court: That is right, same ruling and same exception.

A. Alfred advised in that letter that the attorneys representing the defendants were conferring on some kind of agreement for settlement stipulation.

Q. Subsequently did you receive another letter in the mail? A. I did.

Q. And about when was that?

A. It was about the middle of February. [153]

Q. Of what year? A. 1918.

Q. And in whose handwriting was the letter?

(Testimony of Mr. Clarence Sadler.)

A. It was from Alfred R. Sadler. The letter was sent through the United States mails.

Q. Was it signed by him? A. It was.

Q. Do you have that letter?

A. I have not.

Q. What happened to it?

A. It was destroyed when I was ordered overseas.

Q. Do you recall the substance of the contents of that letter? A. Yes.

Q. What were they?

Mr. Cooke: The same objection, your Honor, as to the last offer.

The Court: Same ruling.

A. Alfred advised me that the attorneys had reached an agreement and that the estate of Reinhold Sadler, the heirs of Reinhold Sadler, were to pay the Huntington & Diamond Valley Land & Stock Company \$15,000 in addition to other matters, such as the claim of Minnie C. Sadler, would not be pressed against the estate and that my mother and my sister would sign papers releasing certain lands to the Huntington & Diamond Valley Land & Stock Company for consideration for the property [154] to be transferred, and it was also stated in the letter that the attorneys for the Huntington & Diamond Valley Land & Stock Company had agreed that the Sadler estate could designate the parties to whom the land could be transferred, the legal title, the Diamond Valley Ranch.

(Testimony of Mr. Clarence Sadler.)

The Court: I think I will reverse the ruling. The objection will be sustained and all the testimony will be stricken and that will go also to the offered exhibit that was also introduced. There was one here this morning to which objection was made. To reconcile it to the statute, to my mind it is the testimony of a deceased person.

Mr. Thompson: There are only two letters he has referred to, your Honor.

The Court: The ruling will be reversed. Objection sustained and all testimony in regard to these two letters be stricken.

Q. Mr. Sadler, when did your mother, Louisa Sadler, die?

A. She died in August, 1923.

Q. And prior to her death did you have occasion to see her handwriting? A. Yes.

Q. How frequently?

A. Oh, a great many times. She used to write me continuously. [155]

Q. I show you Plaintiff's Exhibit 20 for identification. Will you state in whose handwriting that is?

A. That is in my mother's handwriting.

Mr. Thompson: I offer Exhibit 20 for identification in evidence, your Honor.

Mr. Cooke: I would like to ask the witness a question.

The Court: You may do so.

(Testimony of Mr. Clarence Sadler.)

Q. (By Mr. Cooke): Mr. Sadler, referring to this letter that counsel just showed you, and particularly calling your attention to the date, February 29, 1918, is there any change in that body of the letter, any addition there, indicating that that has been changed, the date?

Mr. Thompson: I think the letter speaks for itself, your Honor.

A. I don't notice any change in it. Oh, I notice a little heavier ink, is that what you have reference to?

Q. Yes. Would you say that something had been written on top of something else there?

Mr. Thompson: I object to the question on the same ground——

The Court: Objection overruled.

A. No, I wouldn't say something has been written there on top of it. It may show up by a magnifying glass, but by the naked eye—— [156]

Q. Have you the envelope containing this letter?

A. No, sir, I have not the envelope. Mrs. Kathryn Powers Sadler produced that letter. Mrs. Kathryn Powers Sadler found that letter in Alfred's personal effects.

Mr. Cooke: We object to the letter, first upon the ground that it appears on the face of it that there has been some change or mutilation in respect to the year and maybe the date of the month and the same has not been satisfactorily explained by the witness. We object to it on the further ground

(Testimony of Mr. Clarence Sadler.)

that it merely purports to be a communication from Mrs. Sadler to Alfred Sadler and that nothing that Mrs. Sadler could say would be evidence for or against the defendant in this case; that she was not authorized to make any statements that would be binding upon him, therefore, the entire document is hearsay so far as Edgar Sadler is concerned. That the evidence also is irrelevant and immaterial, not tending to prove any issue in the case.

The Court: Objection will be overruled and the exhibit admitted in evidence as Plaintiff's Exhibit 20.

PLAINTIFF'S EXHIBIT No. 20

Carson City Feb. 29, 1918.

Dear Alfred:

Bertha and Myself wanted you and Edgar to write a agreement for how long you wanted the Morgage of the Diamond Ranch and Cattle. You have to pay me \$50.00 per month and say who has to pay the money to me, and what date, so I am sure of the money. We want this in black and white so in case something should happing to you or Edgar, we will have no trouble like with the Sadlers in the City and be sure of our property, and sell the Ranch for what it is worth at the end of that time and devide the money accordance to the Will, and you have to look out for Clarence to. Edgar will have to pay for Clarence Insurance on his Police in May 24. if he is still in the Army, for Bertha says,

(Testimony of Mr. Clarence Sadler.)

she is not able to pay it, she paid out so much for Clarence. Edgar had all the income from the Ranch and he must pay it. You and Edgar should make another agreement to each other in black and white so you know what each one has to do, and in case something happening that you are safe of your property and money.

Allway make yourself safe in business so you will have no trouble later on. We had a good snow storm last night. Be careful and do not work in the Store and were yourself out, you work enough when you work in your Office, you did not look as well as Christmas time, take care of your health and rest enough the few cent what you get for been in the store don't help you, so goodby.

Lose and kisses from Bertha and Myself. Aunt Biroth is very sick again Clara was called home again.

Your Loving Mother
L.S.

[Endorsed]: Filed Oct. 15, 1946.

Mr. Thompson: Your Honor has read the exhibit?

The Court: Yes, I did read it.

Q. I show you, Mr. Sadler, Plaintiff's Exhibit 8. When and where did you first see Plaintiff's Exhibit 8?

A. I first saw Plaintiff's Exhibit 8 in Carson City in May or [157] June of 1918. I personally

(Testimony of Mr. Clarence Sadler.)

got my mother's tin box out from her bureau drawer and in that box was this agreement.

Q. And that is Exhibit 8?

A. That is correct.

Q. Whose handwriting appears on Exhibit 8?

A. The body of the handwriting is in Alfred R. Sadler's handwriting and he also signed it, together with Edgar Sadler, my other brother.

Q. Are you familiar with the signature of Edgar Sadler?

A. Yes, I received letters from Edgar or letters that Alfred turned over to me with his signature on.

Q. In your opinion is the signature "Edgar Sadler" at the bottom of Exhibit 8 in the handwriting of Edgar Sadler? A. Yes.

Mr. Cooke: Objected to on the ground no proper foundation has been laid.

The Court: Objection will be overruled.

Q. When was it your mother Louisa Sadler died, Mr. Sadler?

A. She died in August, 1923.

Q. And do you know where she had been residing prior to her death?

A. After my sister Bertha died, Alfred took her to Grass Valley, where she resided until her death.

Q. For how long a period was she at Grass Valley, do you know?

A. Well, I wouldn't say; over a year. [158]

Q. Where was your mother, Louisa Sadler, buried?

(Testimony of Mr. Clarence Sadler.)

A. She was buried in Carson.

Q. Carson City, Nevada?

A. In the family plot.

Q. Were you in Carson City, Nevada at the time of her funeral?

A. I came from Washington with my wife to attend the funeral services.

Q. Where were you living at that time, you and your wife?

A. We were living in Washington.

Q. Washington, D. C.?

A. That is correct.

Q. Were any other members of the family present at your mother's funeral?

A. Of the immediate family there was Edgar and Alfred and there were other relations.

Q. At that time did you have any conversations regarding the Diamond Valley Ranch?

A. We did.

Q. Who were present at the conversations?

A. Edgar, Alfred, my wife Doris Reba Sadler, and myself.

Q. Where did those conversations take place?

A. They took place in the house at Carson City, 310 Mountain Avenue after my mother's funeral and after all the other relatives departed.

Q. Will you relate the conversation as you recall it? [159]

A. Well, we asked Edgar and Alfred what disposition would be made of the ranch now that my mother had died and they said that they were going

(Testimony of Mr. Clarence Sadler.)

to try to sell the ranch and divide the money between the heirs of Reinhold Sadler. My wife asked Edgar Sadler what my approximate share would be at that time and he replied approximately \$15,000.

Q. Was there any further conversation with regard to selling the ranch?

A. There was. Edgar said when he returned to the ranch he would make an effort to dispose of the ranch if he could obtain a reasonable price.

Q. What did you and your wife Doris Sadler then do?

A. You mean after we left Carson?

Q. Yes.

A. Why I went to San Francisco and Los Angeles and returned to Washington via Denver. I didn't get back into Washington until November of that year.

Q. How long did you reside in Washington, D. C.?

A. Well, I resided in Washington, D. C., until January of 1924, when I was transferred to the San Francisco office of the Federal Trade Commission.

Q. Did you visit the Diamond Valley Ranch in the year 1925?

A. Well, my wife and I both visited there.

Q. Do you recall the month of the year?

A. We were there in the latter part of July or early August. [160] I think it was the latter part of July of 1925.

(Testimony of Mr. Clarence Sadler.)

Q. When you were present at the Diamond Valley Ranch at that time did you have any conversations with Edgar Sadler regarding the ranch?

A. I did.

Q. Who was present during the conversations?

A. Well, at one conversation Edgar was present, his wife Ethel was present, and my wife Doris Reba Sadler was present, and I was present.

Q. What was the substance of the conversation, as you recall it?

A. The substance of that conversation was the sale of the ranch and we discussed putting it on the market and at that time I asked Edgar what would be a reasonable price for the ranch, in order that I could place the ranch in the hands of real estate people in San Francisco and Los Angeles, and Edgar said a reasonable price would be \$75,000 for the ranch, exclusive of the cattle.

Q. Did he say anything about the value of the cattle?

A. We didn't say anything about the value of the cattle. We didn't discuss the value of the cattle because they could be sold immediately on the market at the market price and that wasn't discussed.

Q. When you and your wife left the ranch, where did you go?

A. Went into Salt Lake and from Salt Lake into Baker, Oregon, [161] and continued into Portland and Seattle. I was making investigations for the Federal Trade Commission.

(Testimony of Mr. Clarence Sadler.)

Q. I show you Plaintiff's Exhibit 22 for identification. Will you state what that is?

A. Yes, that is copy of a letter I sent to Alfred after our conversations with Edgar at the ranch in 1925.

Q. And in whose handwriting is that?

A. That is in my own handwriting.

Q. Did you address and mail the original of which this is a copy to Alfred?

A. I did, and sent it by mail.

Q. Where was he living then?

A. Living in Reno.

Mr. Thompson: We offer Exhibit 22 for identification in evidence.

Mr. Cooke: May I ask the witness a few questions?

The Court: You may do so.

Q. (By Mr. Cooke): Mr. Sadler, the document you just testified about, being copy of letter from you to Alfred, dated August 4, 1925, appears not to have been signed and has been attached to some other sheet. Do you notice up in the corner there?

A. Yes, sir.

Q. Was there any other portion of the letter? Is that all, or was there some more? [162]

A. Yes, there was more of it.

Q. Where is the other part?

A. The other part of this letter?

Q. Yes.

A. I didn't make a copy of the other part. I wrote on the original letter, "With kindest re-

(Testimony of Mr. Clarence Sadler.)

gards," signed it, and I didn't put it on the back.

Q. You mean that is all the letter that you wrote at that time except "with kindest regards?"

A. That is all I recall.

Q. That is on the second sheet?

A. Yes, sir.

Q. How did that come to be taken off of there, do you know? A. Yes. The second sheet?

Q. Yes.

A. There was no second sheet. This letter was attached to one from Alfred.

Q. What was it written on, "With kindest regards?"

A. On the yellow sheet, the same as that paper.

Q. And these holes up here, you held the yellow sheet with this sheet here?

A. That indicated that the letter was attached to the letter I received from Alfred in reply to this letter.

Q. I am trying to find out where that yellow sheet went to, part of this letter, "With kindest regards." [163]

A. That was on the original letter, sir.

Q. What original letter?

A. That I wrote to Alfred. This is copy of the original.

Q. This is copy of it attached?

A. That is it.

Q. A correct copy with the exception it hasn't got "With kindest regards?"

A. I think that is all, yes.

(Testimony of Mr. Clarence Sadler.)

Mr. Cooke: We object to the admission in evidence of the document on the ground it purports to be a copy of letter written by witness to his attorney in fact, Alfred Sadler, and that any statements made in that way could not be evidence against Edgar Sadler. All a person familiar with that rule need do would be to write a letter for evasion and later on put it in evidence and prove his case. I would like to add to this objection, your Honor, that this evidence, and all this type of evidence, is inadmissible and incompetent because its only purpose would be to modify, change and alter the relation established by the judgment in the case of Huntington & Diamond Valley Company against various defendants, these persons here, Edgar and Alfred Sadler and others, on March 2, 1918. That that judgment is *res adjudicata* as to the rights of the parties, not only as between the plaintiff and defendant, but as between the defendants themselves, which would in this case be Alfred and Edgar and the other Sadlers, [164] and that these letters are simply a part of an attempt to upset that judgment and change the legal relations created by that judgment. We call attention, for instance, to the rule of court, which has the force of statute and I suppose would be applicable to federal court as well as State court, that no judgment may be modified, changed, or altered in any way after the expiration of six months. This is not stated to be a proceeding to alter the judgment, but that is the effect of it. The judgment, as we maintain, is

(Testimony of Mr. Clarence Sadler.)

res adjudicata and it is absolutely conclusive, and in no proceeding, direct or indirect, no matter how ingenuously it may be covered up or concealed as to purpose, can the court or the parties be permitted to change the rights established under that judgment after the time allotted for that purpose has expired. For instance, in the case of *Wellington vs. Washoe County Bank*, which is rather a prominent case in federal history in this State, there were several defendants there as we have here, and in that case they did not serve cross-bills as against each other, but the court held that the judgment in that case, which was a foreclosure suit as I recall, was binding and conclusive as between the defendants, even though there were no cross-bills filed. They had the opportunity to litigate it between themselves, but not having done so, the judgment is conclusive, and in this case the judgment rendered on March 2, 1918, established and adjudicated that Edgar and Alfred Sadler were [165] the owners of this property and that was done pursuant to a stipulation and a stipulated judgment at least had as much force and effect as a judgment upon evidence, and while no cross-bill was served in this case by Alfred Sadler upon Edgar Sadler, or vice versa, under the rule of *Wellington* against *Washoe County Bank* that is not necessary. In all cases the judgment becomes conclusive as between rights of parties, irrespective of whether any cross-bill is filed or not. They had that opportunity, so the way we see it, if Clarence Sadler or any other

(Testimony of Mr. Clarence Sadler.)

defendant had any claim on this property, then was the time to file it, and not having asserted it, they lost all right to do so and they are now asking your Honor in effect, it seems to me, to reverse the judgment of the court; in other words, disregard the judgment. So we make the point the whole matter is foreclosed by *res adjudicata* and particularly as laid down in the *Wellington vs. Washoe County Bank* case, which if your Honor desires, I will read it.

The Court: Objection will be overruled and the exhibit admitted in evidence as Plaintiff's Exhibit No. 22.

PLAINTIFF'S EXHIBIT No. 22

Salt Lake City, Utah

Aug. 4, 1925.

Dear Alfred:

Just a few lines to let you know where we are. We arrived in Ogden on the 25th of July and came over here on the 29th. We expect to leave here on Sunday the 9th for Boise Idaho where I have some work which will keep me there about a week. Our address will be General Del. Boise, Idaho for the next ten days.

We both enjoyed our trip to the ranch and feel much better after our vacation. While we were there I had a chance to go duck hunting a couple of times and sage hen hunting once. We caught around 75 young ducks and killed 20 sage hens over at the Henderson ranch. Reinhold took Ethel and

(Testimony of Mr. Clarence Sadler.)

us over to Edgar Lane Plummer's one afternoon where we met Mrs. Plummer, Neva, Edgar and his wife. Edgar is sure big boy now. We took some pictures a couple of which I am enclosing so you can see how the boys have grown.

I had a talk with Edgar about the ranch and the property in Eureka. He says that he is willing to sell if we can get \$75,000. He intends to come to Reno and have a talk with you about everything after the hay is put up. He told me that Mother received \$1400 for the Opera house and about \$900 for the house. I was surprised to learn that. Mother sold the stock in the Prospect Mountain Tunnel. Edgar said that she received \$1300 for it. This is sure interesting as I never heard anything about it. He also said that he can get \$8400 for some of the mines if the Sadlers will sell. When I go back to San Francisco I will see Herman and try to get him to write Edgar a letter saying that he is longer interested in the mines.

[Endorsed]: Filed Oct. 15, 1946.

Q. (By Mr. Thompson): I show you Exhibit 23 for identification, Mr. Sadler, what is that?

A. That is the letter I received from Alfred Sadler.

Q. In whose handwriting is the letter, including the signature?

A. It is in my brother Alfred's handwriting and the signature [166] is Alfred Sadler's.

(Testimony of Mr. Clarence Sadler.)

Mr. Thompson: I offer the letter in evidence, your Honor. Part of the matter relates to other matters, part of it relates to the ranch.

Mr. Cooke: One more thing I would like to ask the witness.

The Court: You may do so.

Q. (By Mr. Cooke): On the second page, Mr. Sadler, this word here, I can't make that out—"Supposed to receive from the estate——"

A. That has to do with some mining claims, Mr. Cooke.

Mr. Cooke: We make the same objection, your Honor, they are communications from Alfred Sadler to Clarence Sadler with reference to certain business matters between them and that it is not evidence as against the defendant, Edgar Sadler, and it is hearsay.

Mr. Thompson: If the Court please, it is a lengthy letter. Perhaps I could read the part that we think is pertinent to the case.

The Court: All right.

Mr. Cooke: I might say especially the first part of it there, that I imagine you want to read, is the part I want to object to.

Mr. Thompson: I am just doing this to point out the part, Mr. Cooke. The judge is going to read the letter [167] anyway. (Reads):

"Dear Clarence:

"A few lines to let you know that we are still alive and making the best of conditions in this section.

(Testimony of Mr. Clarence Sadler.)

“I received a letter from Edgar about a month ago and things were not going as well up in that section as he would like to see them. Now in regard to the ranch will say that we have to renew notes and mortgage on the same to the amount of \$10,000. \$5,000 was borrowed from the bank in Eureka and \$5,000 from the bank in Winnemucca. We made the deal thru Jerry Sheehan and no doubt he will get the money from the Federal Loan Department. Had to buy 500 head of sheep as there is not enough cattle to keep the same going and no doubt will do better by having some sheep as they pay better than cattle. Of course, having sheep is more work but the returns are better.

“No changes of ranch property seem to have been made lately and it looks as if the big outfits do not desire to acquire more. In fact quite a few of the big outfits are selling off their holdings to smaller outfits as the cost of feeding on the ranges has advanced by the Government wanting fees to range cattle on government land unsurveyed or surveyed in the Public Land States.”

The Court: It may be admitted in evidence as Plaintiff's Exhibit 23. [168]

Q. One matter, Mr. Sadler, I wanted to clear up. Calling your attention to Plaintiff's Exhibit 22, Mr. Cooke asked you about the stapling marks in the upper left-hand corner of the letter. Do you

(Testimony of Mr. Clarence Sadler.)

recall how you had the letters marked when you handed them to Mr. Springmeyer and myself?

A. I was going to offer that explanation after the Judge was through reading the letter. I put exhibit numbers on these letters when I sent them to Mr. Thompson and attached a plain piece of paper with the exhibit number. I did that so there wouldn't be anything on the letter proper.

Q. I show you Plaintiff's Exhibit 24 for identification, Mr. Sadler, will you state what it is?

A. That is letter I received through the United States mail from my brother Alfred and it is signed by Alfred.

Q. It is in his handwriting? A. It is.

Mr. Thompson: We offer the letter in evidence, your Honor, and will read the part we deem to be material. Is that satisfactory? The letter is dated September 14, 1927.

Mr. Cooke: Well, I would like to see it.

Mr. Thompson: Well, I thought I could save time. It takes 15 minutes for you to read the letter and 15 minutes for the Judge to read the letter.

Mr. Cooke: Before anything is read in evidence I insist on seeing it. [169]

Mr. Thompson: I am not reading it in evidence, your Honor.

The Court: Point out to him that portion you desire to have in evidence.

Mr. Cooke: I would like to read it all, your Honor, it all goes in evidence.

(Testimony of Mr. Clarence Sadler.)

The Court: You may do so, certainly, go ahead and read it.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of the offer of letter which is dated September 14, 1927, marked Plaintiff's Exhibit 24 for identification, on the ground it is irrelevant and immaterial and it is merely a statement by hearsay as to the defendant Edgar Sadler, statement from Alfred Sadler to Clarence Sadler, partly in regard to the ranch's condition. I make this objection consistently and in good faith because it seems to me that it is a good and valid objection. It is consistent with the rule. My view of it is that the fact it is writing does not take it out of the hearsay rule and it is just essentially hearsay when it is in the form of a letter as it would be if Clarence here testified he met Alfred Sadler on the street here and Alfred told him these things and he comes in and testifies that Alfred told him so and so. That is the way the thing impresses me. I am merely making that statement to your Honor as a reason why I have been so insistent upon the hearsay objection to these communications [170] between the parties and not brought to the attention of Edgar Sadler in any way and not made by anybody who is authorized to speak for him. Alfred Sadler was not authorized to bind Edgar Sadler in respect to the ranch or make statements to Clarence Sadler that would be evidence against Edgar. That is the basis of my objection to these documents, so far as hearsay objection is concerned.

(Testimony of Mr. Clarence Sadler.)

Mr. Thompson: If the Court please, as we view the case, we have shown by strong evidence that Alfred Sadler and Edgar Sadler were co-trustees of the impressed trust. These letters constitute reports of a trustee to the beneficiary of the conditions of the property. They show the interest of the beneficiary in the property and I submit that we cannot see anything that is ruling as to whether a trust has or has not been proved before we produce our evidence.

The Court: That was the thought that I had in mind in overruling that objection, the fact that they were co-tenants. The question is to be determined whether they were trustees or not, but they are co-tenants. Do you want to point out, Mr. Thompson, the portion of that letter that you want in evidence?

Mr. Thompson: If the Court please, we offer the entire letter because the whole letter aids in showing its genuineness, [171] but there is just a portion of it that we rely on regarding the property. The entire letter, relating to other things, shows the genuineness of this whole document, but the portion that we particularly refer to in this letter dated September 14, 1927, is as follows:

“Edgar sold his sheep that he bought a year ago but did not get a extra good price for the same. I judge that he concluded that unless they had 3000 head it would not pay to raise the same. I think that he had only 500 and

(Testimony of Mr. Clarence Sadler.)

just broke even on the same. The expenses of looking after them cost so much per month with a man to herd the same. He did not say what he got but I saw a piece in the paper that he sold for \$10 a head. He is still cutting hay in the big meadow and trying to see if he cannot sell some of the hay this winter.

“Nothing doing in Eureka as yet and so many leaving that there is no market for things up there.”

PLAINTIFF'S EXHIBIT No. 24

Sept. 14, 1927.

Reno, Nevada

Dear Clarence:

A few lines to let you know how things were going in this section.

The town has been somewhat dull after the Exposition and just now getting normal again. Because the University and school has started up.

We have had frosts for the last three or four mornings and it sure played havoc with the farmers raising produce. No doubt this cold spell will cause the potatoes and vegetables a raise in price for the general public.

Edgar sold his sheep that he bought a year ago but did not get a extra good price for the same. I judge that he concluded that unless they had 3000 head it would not pay to raise the same. I think that he had only 500 and just broke even on the

(Testimony of Mr. Clarence Sadler.)

same. The expenses of looking after them cost so much per month with a man to heard the same. He did not say what he got but I saw a piece in the paper that he sold for \$10 a head. He is still cutting hay in the big meadow and trying to see if he cannot sell some of the hay this winter.

Nothing doing in Eureka as yet and so many leaving that there is no market for things up there. The paper states that they hope that mining will start up again.

I wrote to him to send you the data in regard to the ranch so that you would have same and perhaps could find a buyer down in that section. Edward has started walking good now and sure is getting into everything that it keeps us pretty busy so that he will not break things.

Mr. Cessna left Sept. 3, 1927 on his trip to Florida. First he is taking in Yellow Stone Park. I guess he expects to get to Florida about September 20. He says that this trip he planned will take him about two months. He is doing the traveling in his car.

Mr. Powell of Washington, D. C. came and secured your address as he expects to see you in California about Sept. 20. He went to Law School with you in Washington. He said that he just secured his divorcie here. No doubt he will make you a call before he returns back east.

I hope that Reba enjoyed the visit of her folks from the south.

(Testimony of Mr. Clarence Sadler.)

We are all in fair health and hope the your family is enjoying good health. Nothing else of any interest happening around this section. With love and kisses from us all to you all.

Your Brother

ALFRED

[Endorsed]: Filed Oct. 15, 1946.

The Court: We will be in recess now for 10 or 15 minutes.

(Recess taken at 3:30 p.m.) [172]

3:40 p.m.

CLARENCE SADLER

resumed the witness stand on further direct examination by Mr. Thompson.

Q. I show you Plaintiff's Exhibit 25 for identification, which consists of a letter dated at Reno, Nevada, January 18, 1929, and another letter dated at Eureka, Nevada, December 22, 1928. Will you state what that exhibit is?

Mr. Cooke: There are two letters. Which one are you talking about now?

Mr. Thompson: We are offering them as one exhibit.

A. The letter dated January 18, 1929, is letter I received through the United States mails from my brother, Alfred, and it is his signature.

Q. And his handwriting?

A. Yes sir. And the letter dated December 22,

(Testimony of Clarence Sadler.)

1928, is a letter addressed to Alfred Sadler and signature of Edgar Sadler and this latter letter was transmitted with the letter of January 18, 1929, by Alfred Sadler to me.

Mr. Thompson: I offer the letters in evidence, your Honor.

The Court: It may be admitted in evidence, the two letters, as one exhibit, No. 25.

Mr. Cooke: I would like to state our objection, if 'the Court' please.

The Court: You make the same objection? [173]

Mr. Cooke: We make the objection to the letter—there are two—one there is a special objection to. As far as the letter from Edgar Sadler to Alfred Sadler, dated December 22, 1928, included in the offer is concerned, the only objection we have to make to that is that it is irrelevant and immaterial and contains nothing that has any bearing whatsoever in regard to the issues in this case. We object to the remaining portion of the offer, being the letter from Alfred to "Dear Clarence," which is dated January 18, 1929, on the ground it is hearsay as to the defendant, Edgar Sadler, and that a co-tenant has no legal authority to make any statement binding on his co-tenant, nor has a trustee any authority to bind his co-trustee. I add that to my objection in the light of what counsel stated and from time to time gave as his purpose. We have authorities on that that neither co-tenant nor to-trustee has qualifications to make statements of a subject matter binding upon the other.

(Testimony of Clarence Sadler.)

The Court: Objection will be overruled and exhibit admitted as Exhibit 25.

PLAINTIFF'S EXHIBIT No. 25

Eureka, Nevada

Dec. 22, 1928

Dear Alfred:

Received your letter and contents noted as to the Land patents. Are the new F. Mau Land 640 acres and 75.88 acres of mine which cost to patent \$726.93, which I had to have this for the Loan. The land you sent me is over by the alpha field. 160 acres. In regard to the Eureka Tunnel sale they only want to pay \$9300 for the whole thing. All of the stock and it is sure a mix up as they want all of the stock and a quite claim deed also signed by all. So it will take some time to get all this together as the Mau and Sadler have common stock and preferred stock. Herman has 2000 preferred and 10200 shares of stock and I guess the Mau the same. And in our stock we have Mother had 5000 common and 5000 Preferred stock and Father has 4000 Preferred stock the stock I have here so there must be more stock some place of ours. Only 600 outside people. So you can see be a about a 1/3 apiece of the Bond. There is 2 certificate of stock in this bunch that is not fill out mo 249 common. 250 Preferred.

Send you a quart of Beef last mail. Will write again soon.

Your Brother,

EDGAR SADLER.

(Testimony of Clarence Sadler.)

Reno, Nevada.

January 18, 1929

Dear Clarence:

Your letters received and contents noted. I want to thank you for the Xmas presents that you and Reba sent me and the family. We had a Xmas Tree and all enjoyed the same. Edward acted as Santa Claus by giving the presents out.

I thank you for the Birthday present of the box of cigars that you folks sent and have enjoyed the same. Ethel and Violet only stayed one day at the house and I saw very little of them except at meals. She said that John had failed in physical Exam for his position and was working in California. They have a apartment at his mothers. If he does not find work in California no doubt he would go back to the Ranch. It now looks as if the leasing or taking care of Johns Ranch will fall thro because no doubt he will have to go back to the ranch unless he can find a position in California. I thank you for the Cong. Record but did not find anything in the same because the Interior Bill is in conference of House and Senate Committe, and do not know what changes they will do with the bill. Liable to be some changes in heads when Hoover makes his cabinet. I hope they get broad men at the Heads and cut out their economy system.

Kathryn is now giving a few parties in Honor of her Aunt. I guess she will have about 4 so that she can play even with the people that have been so nice to her in different ways. You did not get the

(Testimony of Clarence Sadler.)

point straight from my letter. Edgar paid off the local or state banks what was borrowed from them. But a loan was made from the Federal Reserve Land Bank of Berkeley, California of \$15000 to run a long period at 6%. To do the above and do general improvement. This spring he is going to do a lot of reseeding of some of the fields and also repairing of fences and buildings on the place. Should a chance to sell come up then the people wanting to buy can pay so much cash and assume the loan from the Federal Reserve Land Bank.

It looks as if he is going to have a hard time in making the deal with the Eureka Smelting Company. I enclose his letter that I received awhile back. It does not explain how he is going to make the deal in regard to the Eureka Tunnel.

We have been having some real cold weather up in this section but the last day or so the wind has been blowing therefore look for some snow. The mountains are quite short of snow about 40% of the normal fall. Therefore unless we have some storm water is going to be scarce. The legislature will start next Monday and then no doubt the papers will have some news to give the general public. I think there is going to be some changes in regard to gambling and divorce.

The folks are all enjoying fair health now. The children are getting along pretty good.

Mineral work or mining has not shown any activity as yet in the state and is sure on the bum.

You ought now to be able to make a little on your

(Testimony of Clarence Sadler.)

land down in Clark County since the late turns have taken place for the Big dam to be built.

Nothing of any special news taking place at present.

With love and kisses from us all, hoping you, Reba and Bruce are doing well.

Your Brother,

ALFRED.

[Endorsed]: Filed Oct. 15, 1946.

Q. I show you, Mr. Sadler, Plaintiff's Exhibit No. 26 for identification, will you state what that is?

A. That is a letter I received through the United States mail from Edgar Sadler and it is dated April 3, 1929.

Q. And in whose handwriting is the letter?

A. That is in the handwriting of Edgar Sadler.
Mr. Cooke: What is that date?

Mr. Thompson: It is either the 3rd or 8th of April, 1929. I offer the letter in evidence, your Honor, to show that it is friendly in character, friendly dealings between the brothers after the alleged differences of the brothers in 1925, as testified to by Edgar Sadler.

Mr. Cooke: The only objection we have to that is that it is a matter in regard to mining interests that these parties purportedly had in Eureka, nothing to do with the property in question, and that so far as it constitutes evidence as to the attitude of the parties, friendly or otherwise, is too

(Testimony of Clarence Sadler.)

remote and the relationship could be decidedly hostile so far as that is concerned, and still a letter of this kind. It doesn't prove what counsel claims for it.

The Court: It may be admitted in evidence for the purpose stated by Mr. Thompson as Exhibit 26.

PLAINTIFF'S EXHIBIT No. 26

Eureka, Nevada
April 3, 1929

Dear Clarence:

Received your letter about the Eureka tunnel stock ours is in the bank 14000 shares. Has been there for 2 mo. waiting for the other to send theres. Was in town the other day and they had sent it to the bank, but the bank sent it back to them as they wanted more of the bond than they were to get and divided up to different one, as the paper read the Bonds was to go to me and then send back to them so I do not know what they will do. Sadler want \$3100.00 and Mau want \$3333 1/3 worth of Bond which they were not to get as the whole was only \$9300. There is no news up here and has been a cold old winter for 4 mo. now and still a snowing. Will write to Alfred when I hear about it.

Your Brother,

EDGAR.

[Endorsed]: Filed Oct. 15, 1946.

(Testimony of Clarence Sadler.)

Q. Mr. Sadler, do you recall the year your brother Edgar Sadler was a member of the Assembly for the State of Nevada? A. I do.

Q. What year was that?

A. It was in 1931.

Q. Did you visit in Reno, Nevada, at that time?

A. I visited him in Carson and also in Reno.

Q. In what month was that? [175]

A. It was some time in February or March of 1931.

Q. Did you have a conversation with Edgar Sadler in the presence of Alfred Sadler?

A. I did.

Q. Where did that conversation take place?

A. It took place in the Golden Hotel.

Q. That is in Reno, Nevada?

A. Reno, Nevada, in the lobby of the Golden Hotel, yes.

Q. Was any one present other than Edgar and Alfred? A. No.

Q. Will you relate the conversation as you recall it?

A. I asked Edgar and Alfred what settlement they were going to make for the ranch and both Alfred and myself offered to sell our interests—

Mr. Cooke: If the Court please, I object testifying as to transactions of a deceased person.

Mr. Thompson: If the Court please, I call your attention to the same case, Maria vs. Allied Land & Livestock Company, 49 Nevada. 451. In that case the plaintiff testified that one Pete Etcheepar, the

(Testimony of Clarence Sadler.)

president of the defendant corporation, who had an interest in the transaction adverse to the plaintiff, took the plaintiff to see Mr. Fairchild in the Stock Growers Bank, where Fairchild presented a signature page for him to sign and this Mr. Fairchild was dead at the time of the trial. It was held directly by our Supreme Court that the testimony was properly admitted under the statute, because the other person, Etchecopar, who was a party to the transaction on the side of Fairchild, wasn't shown to be dead and that only the death of all the parties on one side of the transaction would close the lips of the parties on the other side of the transaction.

The Court: Objection is overruled. You may answer the question.

(Question read.)

A. Well, both Alfred and I offered to sell our interests to Edgar and he said he was going to take it up with, I believe he said Jerry Sheehan of the Reno National Bank, and we also discussed the question of putting the ranch on the market and I asked Edgar if he would submit certain data, so that I could list the properties in Los Angeles and San Francisco.

Q. What did you mean by listing the properties?

A. With real estate people, for sale.

Q. Did Edgar Sadler make any statement during that conversation? A. As to what?

(Testimony of Clarence Sadler.)

Q. In reply to your suggestion that you would like data concerning the ranch so it could be listed?

A. He said that the data would be furnished to either Alfred or myself.

Q. I show you Plaintiff's Exhibit 27 for identification. Will you state what it is? [177]

A. It is a letter I received from Alfred R. Sadler and it is signed by Alfred R. Sadler. It is his signature.

Q. It is also in his handwriting?

A. It is.

Q. The letter is dated March 8, 1931?

A. Yes, I would say it is.

Q. Is the envelope which is clipped to the letter the envelope in which the letter was received by you?

A. Yes sir, and it is postmarked Reno, March 9, 1931, and that is the envelope in which Alfred's letter was received.

Q. Where were you at that time?

A. I was in Los Angeles, California.

Mr. Thompson: I offer the letter in evidence, your Honor.

Mr. Cooke: The same objection, your Honor, that it is simply a communication from Alfred Sadler to Clarence Sadler. Hearsay as to the defendant, Edgar Sadler. Not admissible for any purpose.

The Court: Same ruling. The exhibit is admitted as Plaintiff's Exhibit 27.

(Testimony of Clarence Sadler.)

PLAINTIFF'S EXHIBIT No. 27

Reno, Nevada

March 8, 1931

Dear Clarence, Reba and Bruce:

A few lines to let you know Kathryn was taken to Mrs. Marsh March 4, 1931—about 8:15 a.m. and the boy was born a little before eleven a.m. Kathryn and the boy are both doing fine.

I am afraid that Kathryn will not be able to nurse him as the milk does not seem to come. The boy gets real mad as he sure wants to eat. Therefore I guess we will have to feed him on the bottle.

He weighed 8½ lbs and seems to be real active and looks like Edward when he was a baby.

Kathryn wrote before she went to Mrs. Marsh and I dropped a few lines but judge those letters are in Berkeley and you will get them on your return.

The children are all enjoying good health and keep one busy. It has been a little cold and windy so they do not want to play out in the yard. I think that his name is going to be George Powers Sadler. Edward says to call him George and Patricia says to call him Sam. Kathryn wants Powers for his middle name, Edgar and Ethel has not said anything further about our talk to Edgar and do not know what he is going to do.

I guess the legislature is getting down to work now and therefore will see very little of Edgar as I have not the time to bum around down town.

(Testimony of Clarence Sadler.)

Glad to hear that you are all enjoying good health and that everything is going as well as possible.

I will give Edgar your address but as yet he has not said whether he is going to California or not. We have no snow or rain and everything is sort of burning up. No doubt things will be dry up this section during summer and fall.

I think you had better write Edgar to send you the data in regard to the ranch and this might sort of force them to say what they are going to do. I will tell him that you expect to be in Los Angeles about two months.

With love and kisses from us all to you all.

Your Brother,
ALFRED.

(Copy of Envelope)

A. R. Sadler	Reno, Nev 2	(Stamp)
92 Bell St.,	Mar 9	
Reno, Nevada	2 - PM	
	1931	

Mrs. Clarence T. Sadler
Apt. 209 - Tarrymore Apartments
974 South Gramercy Place
Los Angeles
California

[Endorsed]: Filed Oct. 15, 1946.

(Testimony of Clarence Sadler.)

Q. Mr. Sadler, in your testimony relating to the conversation which occurred in February or March, 1931, in the Golden Hotel, you mentioned Jerry Sheehan. Who was he?

A. As I recall it, he was connected with the Reno National Bank. Whether he was cashier or vice president, I don't know. [178]

Q. Mr. Sadler, I show you Plaintiff's Exhibit No. 28 for identification, which consists of a two-page letter dated April 6, 1931, with envelope and sheet of paper with some pencil handwriting and some figures on it and the letterhead of the 35th session of the State Legislature, Assembly Chambers for the State of Nevada, with some notations on it in ink. Will you state that exhibit is?

A. Well, the first part of the exhibit is a letter dated April 6, 1931, signed by Alfred, addressed to me, which I received in the United States mails. It is the signature of Alfred and in his handwriting. At that time our office was located in the Flatiron Building in San Francisco, and the envelope is—I just can't make out, it is blurred there, but it is postmarked in 1931.

Q. The "April" is clear, is it not?

A. It is. And the next paper is a statement in Alfred's handwriting and it sets forth certain data in regard to the Diamond Valley Ranch, and the next paper is——

Q. That is on the letterhead of the Assembly Chamber of the 35th Session of the Nevada Legislature?

A. It is.

(Testimony of Clarence Sadler.)

Q. In whose handwriting is that?

A. That is in the handwriting of Ethel Sadler, wife of Edgar A. Sadler, except on the last page appears the words, "not including commission," which is in the handwriting of Alfred R. Sadler.

Mr. Thompson: I offer the Exhibit 28 for identification in evidence, your Honor.

Q. The letter dated April 6, 1931, from Alfred refers to the other papers, does it not, being enclosed?

A. Yes, sir, and the other papers were transmitted with that letter.

Mr. Cooke: May I inquire.

The Court: Yes.

Q. (By Mr. Cooke): The only portion of this Exhibit 28 for identification that is in Alfred's handwriting is, according to your testimony, the concluding portion after what you say is Mrs. Sadler's handwriting?

A. That is correct sir. That is in Alfred R. Sadler's handwriting, "Not including commission," those three words.

Q. What was that answer again?

A. I say three words, "Not including commission" are in the handwriting of Alfred R. Sadler.

Q. Is there any of this in the handwriting of Edgar Sadler?

A. No. It is in the handwriting of his wife, Ethel Sadler.

Q. A portion of it?

A. All except the last three words.

(Testimony of Clarence Sadler.)

Q. This letter here, this is not in her handwriting?

A. The letter addressed "Dear Clarence" and signed by Alfred is in the handwriting of Alfred R. Sadler.

Q. When you say all in her handwriting, you are referring to [180] the enclosure?

A. I am referring to the stationery that bears the Nevada State Legislature here.

Q. With the exception you already stated about those three last words? A. Yes sir.

Mr. Cooke: We object to the offer of Plaintiff's Exhibit 28 for identification in evidence, on the ground that it contains nothing constituting evidence against Edgar Sadler or anything that would bind him; that according to the witness's testimony the latter part of the exhibit, which is addressed to him and signed Alfred, is simply a statement by Mr. Alfred Sadler to Clarence Sadler, neither of them being agents of the defendant, Edgar Sadler, Alfred Sadler having no authority to say anything binding as to Edgar Sadler; that he was not his agent, was not his partner, that he sustained no legal relation authorizing him to speak for Edgar Sadler. The other letter, which the witness states is in the handwriting of Mrs. Sadler is no evidence against Edgar Sadler whatever the contents might be and whatever might be stated there. There is no evidence showing that she was authorized to make any binding declarations against Edgar Sadler. Under the law of this state the husband

(Testimony of Clarence Sadler.)

is the statutory agent for the community property and the business is transacted by the husband and not the wife. [181]

The Court: Do you want to say anything on this question of admissibility of Mrs. Sadler's letter?

Mr. Thompson: No. If your Honor will read the letter from Alfred Sadler, it enclosed this information as having been received from Ethel and Edgar Sadler and it ties in with the conversation which was held in the Golden Hotel in February or March, 1931. The fact that the data is given on the stationery of the Assembly, of which Edgar was a member at that time, is further proof of its genuineness.

The Court: Objection will be overruled. The two documents, the letter of April 6, 1931, from Alfred Sadler and the document attached on the Nevada Legislature letterhead, will be admitted in evidence.

Mr. Cooke: That includes the entire offer?

The Court: Yes, the whole offer, as Exhibit 28.

PLAINTIFF'S EXHIBIT No. 28

Reno, Nevada

April 6, 1931

Dear Clarence:

A few lines to let you know that we are all doing fairly well. The children have pretty fair health and growing.

(Testimony of Clarence Sadler.)

George Powers seems to have quite a bit of colic as yet have not found a baby food that agrees with him. For two weeks or so it was a hard time to get him to take his bottle but now he seems to be doing first rate. He sleeps a plenty and is restless the first part of the night. Kathryn does not seem to recover her strength and is not in the best of health as she has quite a bit of headache and claims of being weak and cannot do everything that she plans to do. Thus it makes her nervous and somewhat cross.

I am doing fairly well, but as yet have not had my teeth taken out but will before long. Mr. Ridgway one of the field engineers had all his taken out and has his false teeth already he is making our real well with them.

Under the new Bill passed by Congress does your department get the Saturday afternoons off the year round. It seems that our branch being outside of Washington, D. C. is considered in the field and so we do not get the Saturday afternoons off. But they are working on the same to give it to us but the President has to make an Executive order. Edgar I guess is not going to take up the proposition of buying the interest in the ranch.

I do not think he can get the money from what he said. I think that he tried to make a borrow from the Reno National Bank but they told him money was too tight. They also told him that they let a sheep man have the Bank ranch in Fish Creek

(Testimony of Clarence Sadler.)

if he would pay interest and taxes on the same to the Bank as they could not run the same at a profit.

I am sending you the data that they sent down to me to send to you send their return to the ranch. They did not take any trip to California as from what Edgar said his expenses were \$250 more than he received from the Legislature and that they did not have the money so much for things in general and I guess Ethel was sore because I told her that you were down in Los Angeles and they had better send the data to you if they did not want to consider the proposition. It looks to me as if they have things tied up and now worrying about cash.

No snow in the mountains and water will sure be scarce this year. Things right at present is sure dry and conditions do not look good. Mining is sure at a stand still and not much doing. Little work in the office nothing else there will close with love from us all to you, Reba and Bruce, Edward would not go along on the ranch with them. Violet did not like to come up to the house because she could not run wild so stayed down at the hotel. Ethel sure did the Society and did not look much after Violet but let her make out for herself. Hoping that you are all well and enjoying good health.

Your Brother,

/s/ ALFRED.

(Testimony of Clarence Sadler.)

Sadler Ranch in Diamond Valley, Eureka County, Nevada, known as the Diamond Valley Ranch.

Patented 3120 Acres.

160 Acres in Alfalfa.

200 acres in tame hay.

80 acres used for garden

300 acres for pasture.

600 acres covered by spring and reservoir.

Balance in pasture and wild hay.

Springs supply 13 second feet of water which runs in the reservoir and ditches. Range land in neighborhood which belongs to Government but used to range cattle from long usuage will run about 600 hundred head of cattle which will have to feed in spring and hard winters.

Ranch could cut 1500 tons of hay but some of the fields need reseeding to bring this up to condition.

They want \$65000 Cash for same.

Commission is not included.

The cattle is not included.

A mortgage of \$13500 is now on the property held by Federal Land Bank. Therefore price of ranch in cash would be $\$65000 - \$13500 = \$51,500$ cash.

[Letterhead Nevada State Legislature, Thirty-fifth Session.]

Sadler Ranch in Diamond Valley, Eureka Co. Nevada consists of 3120 acres of patented land, 200 acres of tame hay the balance in pasture and wild hay, running spring of 13 second feet.

(Testimony of Clarence Sadler.)

Cuts 600 ton of hay and could cut more.

Can run from 8 to 900 head of cattle.

Ditches made for all land, fenced with three barbwire fence.

Five room concrete home and fine big stone cellar three feet wide.

Barns, outhouses and corrals all in good condition.

Considered one of the best ranches in Eureka Co. due to unlimited supply of water.

78 miles from main line, 14 miles from narrow gauge and 33 miles from town of Eureka on Lincoln Highway.

Water in spring hot sulphur water would make a wonderful resort.

Price \$65,000—not including commission.

(Copy of Envelope)

[From] Alfred R. Sadler, United States Department of the Interior, Box 433, Reno, Nevada.

(Stamp) Reno, Nevada 2. Apr. 11, 6 P.M., 1931.

[To] Mr. Clarence T. Sadler, Federal Trade Commission, Flatiron Bldg., Market Street, San Francisco, California.—Personal.

[Endorsed]: Filed Oct. 15, 1946.

Q. (By Mr. Thompson): I show you Plaintiff's Exhibit 29 for identification, Mr. Sadler, will you state what that is?

(Testimony of Clarence Sadler.)

A. That is a letter dated April 11, 1931, addressed to me and signed by Alfred and in his handwriting. It was received by me by United States mail.

Mr. Thompson: I offer the letter in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to [182] the exhibit on the ground that it is hearsay, that it is simply a letter from Alfred to Clarence, principally in regard to the condition of the family and with reference to Edgar I think is in the first two lines and in any event it is subject to the hearsay rule, Alfred's statement not being any person's that could make any record sufficiently binding on Edgar Sadler or constitute any legal evidence against him. No foundation laid for admission in evidence of any such document.

The Court: Objection overruled. The exhibit may be admitted in evidence as Exhibit 29.

PLAINTIFF'S EXHIBIT No. 29

Reno, Nevada

April 11, 1931.

Dear Clarence:

Just a few lines to let you know that I have written to Edgar to send you more data in regard to the ranch.

The assessed value of the property in Eureka County and the rate of taxes per hundred dollars in the county.

(Testimony of Clarence Sadler.)

The price per head he would take for his cattle and the number that could be had on the property.

Also to sends you some snap shots of the Springs and the reservoir that is impounding the water which I hope that they will send to you before you return to Berkeley and while you are still in Los Angeles.

Baby George is gaining now a little each week and doing better in regard to his eating. He is somewhat fussy in the nights but sleeps good in the days. I think that later this will wear off. Judge that it is the colic that bothers him in the nights as he eats too fast. Edward and Patricia are doing real well and like to play outside all the time. Kathryn is having a hard time as they can open the gate and want to go out in front. Then she has to watch them as they are liable to go down to the River or play in the streets. Kathryn is not so well as she worries too much and it seems that she is slow in gaining back her strength and she wants to do things but has not the "pep" or strength and that makes her cross and nervous.

Helen is doing fairly well in her school work but likes to go and play quite a bit and does not like to do as much housework as her mother would like her to do.

The new gambling and six week divorcee bill as yet has shown no improvement of bring any more

(Testimony of Clarence Sadler.)

people here as yet. Of course the gambling will bring some money to the City and County and help pay the taxes in a way.

The building boom is sure taken a drop around this section. It seems that money is tight and hard to get.

The business men are sure kicking as conditions is getting harder and the hard times are hitting this section that has been in the East.

The snow is fast disappearing from the mountains and the River has not shown an extra increase. They claim that June 15 will see the River about dry through the town.

Sorry to hear that Bruce is having trouble with his eye but hope the same will soon disappear. Perhaps by wearing glasses for awhile he would overcome to the same.

You no doubt have been pretty busy with the new case that you are getting data on and sure has given you quite a stay down in Los Angeles. No doubt Reba would like to get back to Berkeley as I guess it must be getting warm down there.

Nothing else of interest therefore will close with love and kisses to all from us all.

Your Brother,

ALFRED.

[Endorsed]: Filed Oct. 15, 1946.

(Testimony of Clarence Sadler.)

Mr. Thompson: The part we were particularly interested in, your Honor, is the part that states: "Edgar, I guess is not going to take up the proposition of buying our interest in the ranch. I don't think he can get the money from what he said. I think he tried to make a borrow from the Reno National Bank but they told him money was too tight."

Mr. Cooke: That has reference to Alfred's interest in the ranch. It is a question if it is a co-tenancy.

Mr. Thompson: You didn't so say in your answer, Mr. Cooke.

Mr. Cooke: There are a lot of things you didn't say in your complaint either.

Q. I show you Plaintiff's Exhibit No. 30 for identification, will you state what that is please?

A. That is a letter dated May, 1931, addressed to "Dear Clarence," signed "Alfred." It is in the handwriting of Alfred Sadler and his signature and I received that in the mails from Alfred Sadler and the envelope attached is rather blurred, but the postmark shows May, 1931, addressed to me, Federal Trade Commission, Flatiron Building, San Francisco.

Q. Is that the envelope in which you received that letter? A. It is.

Mr. Thompson: I offer Exhibit 30 for identification in evidence, your Honor.

Mr. Cooke: Same objection, your Honor. The defendant, Edgar Sadler, objects to the offer on

(Testimony of Clarence Sadler.)

the ground it is simply a communication between Alfred Sadler to Clarence Sadler; no foundation for its admissibility. Nothing to show that Alfred had any authority to make any of the statements in the letter, so far as Edgar Sadler is concerned. It doesn't constitute any legal evidence, anything against Edgar Sadler, doesn't tend to prove or disprove any issue in the case. It is hearsay as to Edgar Sadler.

The Court: It will be admitted in evidence as Exhibit 30. Objection overruled.

PLAINTIFF'S EXHIBIT No. 30

Reno, Nevada

May 8, 1931

Dear Clarence:

Just a few lines to let you know that we have moved from 92 Bell Street to 461 Vine Street.

The new house is a brick building and is larger than the other cottage. There is no fence around the same but it has a good back yard. In the back yard is a garage that we use for a storage place to keep trunks and other things. We have also a wood and coal shed in the back yard and plenty of extra ground for the children to play. I am going to put up a swing for them next week.

The front yard has a nice lawn and more could be put in in front as from the side walk to the curb is a space about ten feet wide which could

(Testimony of Clarence Sadler.)

be put in as lawn. A nice front porch that one can set out in the evenings and also plenty of room for the children to play on. To the south of the house is a lawn that is good size.

Therefore you see that I will have a big lawn to take care of this year. Helen says that she is going to plant some flowers but as yet has not started. A few Apple trees in the back yard, two nice lilac trees in the front yard nice vines that will be in the front porch. Hops will cover the back screen porch this summer. We are paying \$45.00 per month for this place.

It also has a nice cellar for which I am glad as I can get a few sacks of spuds for winter use.

Kathryn can now put up fruit if she wants to and in the cellar will be a nice place to keep the same.

The house has two bedrooms, a large dining room which Kathryn is using for a bedroom.

A parlor and hall which is used as the living room.

Helen has one bedroom. In the other bedroom we have two beds so that Edward has his bed and a bed also for Patricia. These two beds are double beds.

A nice bathroom, a pantry and the large kitchen is used as a dining room and kitchen. A coal range and a gas range in the kitchen. The sink is in the pantry and plenty of selves and things sort of handy in the same.

(Testimony of Clarence Sadler.)

The only bad feature is I cannot go home for noon as the same is about 12 blocks from the office.

I have not heard anything from the ranch or any word from Edgar. Do not know whether he has sent you any more data in regard to same or not.

Send you a clipping from the Journal about Reinhold in taking his 3rd degree in Eureka.

Nothing else of any importance happening in this section. Mining is at a stand still in this state and no mineral work in the office. Working on Township work cannot say as whether the new divorce law has helped or not as yet.

The gambling has sure helped the cafe and hotel people as it sure has brought plenty of people here to buck the same.

Women are now allowed to go an gambling and they have sort of fixed up places so that they can do the same.

Kathryn is not in the best of health and seems slow about getting back her strength and lacking "pep" but after sort of getting settled I now no doubt she will be better satisfied and show improvement. Love from us all to you all.

Your Brother,

/s/ ALFRED,

Box 433, Reno, Nevada.

(Testimony of Clarence Sadler.)

(Copy of Envelope)

From A. R. Sadler, Box 433, Reno, Nevada.

(Stamp) Reno, Nev. 2, May 8, 6 P.M., 1931.

[To] Mr. Clarence T. Sadler, Federal Trade Commission, Flatiron Building, Market Street, San Francisco, California.—Personal.

[Endorsed]: Filed Oct. 15, 1946.

Q. I show you Exhibit 31 for identification, Mr. Sadler. Will you state what that is?

A. That is a letter dated May 20, 1931, addressed to "Dear Clarence," signed "Alfred." It is in the handwriting of my brother, Alfred R. Sadler, and his signature appears on the letter and that letter was received by me from Alfred by United States mail.

Mr. Thompson: I offer Exhibit 31 for identification in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of Plaintiff's Exhibit 31 for identification, on the ground the same is immaterial, no proper foundation laid for its admission in evidence, and that it isn't shown that the party writing same, to-wit, Alfred Sadler, had any authority to make any statements or representations binding or constituting legal evidence as to Edgar Sadler, and that the document is hearsay as to Edgar Sadler.

The Court: The objection will be overruled and exhibit admitted as Exhibit 31.

(Testimony of Clarence Sadler.)

PLAINTIFF'S EXHIBIT No. 31

Reno, Nevada

May 20, 1931

Dear Clarence:

Just a few lines to let you know that we are getting along fairly well and making the best of condition. We are about settled in the new house and find the same much better than the one on Bell Street. I do not go home from the office for lunch but take a sandwich for my lunch and go to the 5 and ten store for a drink.

The children have plenty of room to play and doing fairly well as there is no fence. They keep off the street in front of the house but play quite a bit on the side street. I have put up for each of them a swing and it is sure used by them and the neighbor children. The front porch is fine in the evenings, nice and cool and plenty of room on the same. Enclosed find a check for Ten which is to buy something for your birthday. Plenty of people around the gambling games, the tourists and others all sure back the same. Women have parties to go down and see the sights and also play them. I think that Kathryn is a little now on the mend and if she would go out a little each day it would help quite a bit. But of course it is hard to take the three children when she goes out that is why I think she does not go out enough. I have not received any letter from out at the ranch and do

(Testimony of Clarence Sadler.)

not know whether they have sent you any more data or not. I guess they now are guessing what to do in regard to the same but judge he cannot get any money to take up the proposition.

I suppose that Floyd will soon be going home for vacation as the University has closed here in Reno and the students all left. I think the Public Schools close here about June 6.

There is very little snow on the mountains around here but as yet they have not opened the gates up at Tahoe.

I judge that you are now busy as the other party has by this time gone to Washington, and working on your report about the data you gathered in Los Angeles.

I hope that Bruce is getting along all right and the trouble with his eye is leaving him.

Patricia, Edward, George and Helen all send their love and kisses to you all. I will take the flowers over to Carson City perhaps the evening of the 29th or it might be the 30th.

Nothing else of any news on items of importance.

From your Brother,

ALFRED.

[Endorsed]: Filed Oct. 15, 1946.

(Testimony of Clarence Sadler.)

Q. I show you Plaintiff's Exhibit 32 for identification, which consists of two letters, one dated June 16, 1931, with the envelope, and a letter dated June 7, 1931. Will you state what those are?

A. The letter dated June 16, 1931, and addressed to "Dear Clarence" and signed "Alfred" is a letter I received by the mail from Alfred and it is signed by him and it is in his handwriting and the envelope in which the letter was enclosed is postmarked June 16, 1931. It is addressed to me at 2409 Adar Street, Berkeley, California.

Q. Is that the envelope in which you received the letter? [185]

A. That is, and also the following letter, dated June 7, 1931, addressed to "Dear Alfred" and signed "Ethel" accompanied Alfred's letter of June 16, 1931, and was enclosed in the same envelope and the letter dated June 7, 1931, is in the handwriting of Ethel Sadler, wife of Edgar A. Sadler.

Mr. Thompson: I offer Exhibit 32 for identification in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of Plaintiff's Exhibit No. 32 for identification, particularly to that portion of it identified as being letter dated June 16, 1931, from Alfred to Clarence, on the ground that it purports to be statements made by Alfred and no foundation laid showing that Alfred could speak on behalf of Edgar Sadler. The same is hearsay and the matter contained is irrelevant and immaterial to any issue in the case. We make

(Testimony of Clarence Sadler.)

the special objection to the letter annexed, dated June 7, 1931, written by Ethel Sadler, on the ground no foundation has been laid for the admission of that document as being made by any one authorized to make any binding statements to the defendant in this case. The wife is not, by the mere fact of being a wife, authorized to make any representation in regard to the business of the community or community property.

The Court: You make the same objection as before?

Mr. Cooke: As a special objection as to the letter signed Ethel. [186]

The Court: Same ruling. The exhibit will be admitted as Exhibit 32.

PLAINTIFF'S EXHIBIT No. 32

Eureka, Nev.

June 7, 1931

Dear Alfred:

We received your letter some time ago and hope you will be more satisfied with your new home. It was quite a task for Kathryn to move when she wasn't so well.

Am sorry to hear about little Bruce wearing glasses—There was a little girl just three at the hotel wearing glasses.

We received a letter from some real estate firm that Clarence had spoken to wishing more data which I sent also some pictures of the spring and house and barns.

(Testimony of Clarence Sadler.)

I don't imagine anyone would buy a year like this and we wouldn't sacrifice our cattle after staying with them so long unless we got a good price.

The say Moffats man has bought all the surplus hay for \$10 a ton and that steers will be \$.04 a lb. this year, if that is the case we will have to borrow to run on after selling steers.

We are as desirous to sell as anyone if we get a satisfactory price but I think it ridiculous to even talk sell a year like this it seems to me it shows poor business ability.

We will send whatever we receive from the Real Estate men on to you——

With love to all and hoping all are enjoying good health now.

With love,

ETHEL.

Reno, Nevada

June 16, 1931

Dear Clarence:

Just a few lines to let you know that we are all enjoying fair health and making the best of conditions.

Last evening it rained and the tops of the mountains had a light covering of snow. We are having sort of rainy weather now which makes it good for the farming as they need water. The River is about dry and the winds has been hard on the garden

(Testimony of Clarence Sadler.)

truck. The open gambling, horse race and prize fight has sure brought plenty to the town. The hotels and cafes are doing a big business. The rates at the hotels have all been doubled from what they used to be. I guess about ten thousand no doubt will take in the fight from reports. Plenty of fronts have been changed to make place for the new gambling places. \$70,000 has been spent out at the race track for the new ring and casino in regard to the horse racing and prize fight. Kathryn had all her lower teeth taken out and I guess in a month will have a new set of upper and lower. She beat me in regard to having her teeth taken out and also has had her hair bobbed so you see, she thinks that it relieves her headache and no doubt is less trouble taking care of the same as she has it cut men style right now maybe later will have a way put in the same when it grows a little more.

I enclose a letter that I received from Ethel. She says that she has sent some data to the real estate men in Los Angeles.

It looks as if she is getting afraid that a buyer is going to show in regard to the ranch.

I said that she said the price of the ranch was \$65,000—\$13,500=\$51,500 cash and the buyer to assume the mortgage of \$13,500 which I thought was a good price for the property. What they want in regard to cattle, I do not know and they do not say.

It looks as if they now are beginning to worry a little because she has went in Reinhold in buying cattle and prize is dropping in regards to same.

(Testimony of Clarence Sadler.)

With love to all from us all. Hoping that everything is going right and you all are enjoying fair health.

Your brother,

/s/ ALFRED.

(Copy of Envelope)

[From] Alfred R. Sadler, United States Department of the Interior, General Land Office, Box 433, Reno, Nevada.

(Air Mail Stamp) Reno, Nev 2, June 16, 6 P.M. 1931.

[To] Mr. Clarence T. Sadler, 2409 Cedar Street, Berkeley, California.

[Endorsed]: Filed Oct. 15, 1946.

Q. Mr. Sadler, I show you again Exhibit No. 28. After receiving that letter and enclosures, did you do anything with regard to the Diamond Valley Ranch property?

A. Yes, I listed it with two real estate firms in San Francisco, one firm Banker & Caldwell; another firm located on the first floor of the Flatiron Building.

Q. Did you list it with real estate firms or agents in any other city?

A. I may have listed it with one firm in Los Angeles, I am not positive.

(Testimony of Clarence Sadler.)

Mr. Thompson: That completes our evidence regarding the transaction in 1931, your Honor, and would be a convenient time to stop, if satisfactory with your Honor.

The Court: Then we will be in recess in this case until tomorrow morning at 10:00 o'clock.)

(Recess taken at 5:00 p.m.) [187]

Wednesday, October 16, 1946, 10:30 A.M.

Appearances same as at previous sessions.

CLARENCE SADLER

resumed the witness stand on further

Direct Examination

By Mr. Thompson:

Q. Mr. Sadler, while you were testifying yesterday Mr. Cooke asked you about Plaintiff's Exhibit No. 22, which is a copy of a letter you wrote to Alfred Sadler dated August 4, 1925.

A. Yes, sir.

Q. You testified there was an answer to that letter? A. I did.

Q. I show you Plaintiff's Exhibit 33 for identification. Will you state what that is please?

A. This is a letter dated August 6, 1925, addressed to "Dear Clarence" and signed "Alfred" and it was received by me through the mails and it is in Alfred's handwriting and his signature.

No. 11715

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDGAR A. SADLER,

Appellant,

vs.

CLARENCE T. SADLER,

Appellee.

Transcript of Record
In Two Volumes
VOLUME II
Pages 337 to 697

Upon Appeal from the District Court of the United States
for the District of Nevada

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Upon Appeal from the District Court of the United States
for the District of Nevada

(Testimony of Clarence Sadler.)

Mr. Thompson: I offer Exhibit 33 for identification in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of Plaintiff's Exhibit 33 for identification on the ground it is irrelevant and immaterial, does not prove or tend to prove any issue of the case now on trial before your Honor, which I understand is the question whether or not a trust exists. That it is incompetent and no proper foundation laid for its admission in evidence, in that it [188] merely purports to be a letter from Alfred Sadler to Clarence Sadler and Edgar's connection with it, by signing it or the like is in no way shown. That it is hearsay as to Edgar Sadler. The objection, if the Court please, is the same as we made to previous offers of the same type, that it is incompetent and immaterial and irrelevant, because we are here trying the question of whether a trust exists, a trust in this ranch, this Diamond Valley Ranch. If Exhibit 8, which is Exhibit "L" annexed to the complaint, and which document purports to be signed by Edgar and Alfred Sadler, which signature Edgar denies, if that, being admitted in evidence, establishes a trust, then, of course, there would be no case of any sort, but I am not questioning but what it is proper to the evidence if it is legal, particularly if it is something that there might be some question about the principal piece of evidence, which in this case is that particular document, but these letters, your Honor, that have been written between Alfred and Clar-

(Testimony of Clarence Sadler.)

ence, it is inconceivable to me how they can tend to establish a trust or be material for that purpose at all, nor do I see that they can be material for any purpose. The law is settled, I attempt to say, that declarations of a co-tenant, merely by reason of being a co-tenant, are not legal evidence against the other co-tenant, but these declarations of Alfred to Clarence, or anybody, in regard to the property would not be legal evidence against Edgar, the other co-tenant of the [189] ranch, in the absence of evidence showing that Edgar authorized him. So in regard to co-trustees, assuming co-trustees is shown in the case, assuming there is any evidence upon which it might be said that Edgar and Alfred were co-trustees, the declaration of one co-trustee is not evidence against the other. They are in exactly the same place as co-tenants, so far as the rule of evidence is concerned with reference to one binding the other. That rule is laid down by Wigmore and numerous authorities to the same effect. Now with that as a starter, your Honor please, we come down to a question then of what constitutes legal evidence of a trust and then we go to the statute, Section 1527, which seems to me to circumscribe and limit court and counsel and everybody as to the type of evidence that is admissible. Section 1527 reads:

“No estate, or interest in lands, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall

(Testimony of Clarence Sadler.)

hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing.”

Now we had an illustration of what seems to be a departure [190] from the authorization of the statute when the letter of Mrs. Ethel Sadler was admitted in evidence. If that had any fundamental value at all in the case, it would tend, of course, I take it to the establishment of a trust, some kind of recognition on the part of Edgar Sadler, through his wife, that a trust did exist, to make a report and furnish data and the like. My conception of the statute there would be that that matter would not be competent evidence against Edgar Sadler unless it was shown that Ethel Sadler had been authorized by him in writing, as required by law, to act as his agent in respect to the matter. The law is so broad that it is impossible to entertain any doubt as to its absolute and complete application to the situation here. “Unless by operation of the law,” of course, that has to do with partial performance. If there is a part performance the courts in equity hold that that takes it out of the statute. We haven’t anything to do with part performance here, so then we have the bald and naked provision that no evidence is admissible for the

(Testimony of Clarence Sadler.)

purpose of creating a trust over or concerning lands unless it is in writing and subscribed by the party creating the same, or by the party who is charged with it, in this case Edgar Sadler. We declared our position on the matter that there is nothing in the way of evidence, unless it is signed by Edgar Sadler, that would be competent to bind or hold him and hence these letters passing between Alfred and Clarence are just so much [191] waste paper, so far as this case is concerned. It is very possible if we reach the stage of an accounting, that that might have some evidential value, but we are not there and for the time being the only evidence I understand we are concerned with is evidence that legally establishes, or tends to establish a trust, and we know from the statute that must be in writing and must be signed by Edgar Sadler, and hence anything not signed by Edgar Sadler or by his agent, authorized by him in writing, is not admissible. So we make the objection to this and move to strike all of the exhibits that have already gone in of the same type. I think your Honor expressed the ruling to strike in one instance.

The Court: I want you to all understand that I am willing at any time, in this case or any other matter, if it be pointed out to me that I make an incorrect ruling, I have no hesitancy in admitting a mistake and striking out any ruling I might make.

Mr. Thompson: With regard to Mr. Cooke's position, your Honor, I would like to point out that for the purpose of the present argument he has

(Testimony of Clarence Sadler.)

conveniently overlooked the fact that the bulk of his answer consists of pleading of defense of laches. As I understand the law, in a case of this character the burden of proof and pleading of laches is on the defendant, but where a delay appears, the burden of going forward [192] with the evidence in the first instance is on the plaintiff and that is what we are doing at this time, explaining the delay. A defense of laches asserted by the defendant naturally assumes existence of a trust. That is the premise upon which the defense is based. Before any defense of laches is applicable, the trust must be assumed. In presenting our evidence on that phase, we must therefore assume the existence of a trust, for the purpose of determining the question of the admissibility of evidence and so assuming that, which we know your Honor has not yet decided, but it must be assumed in considering the introduction of evidence on that issue, we then are entitled to introduce evidence regarding transactions between a beneficiary and one or both of the co-trustees of a trust and that is what we are doing and have been doing for some time with these letters and from that point of view I think there is no question but they are admissible, your Honor.

The Court: I had the idea in overruling these objections strictly the objection that they violated the hearsay rule, that this might be an exception to the hearsay rule, declarations against interest. Alfred and Edgar Sadler were joint grantees or co-tenants and their interests in this land, so far

(Testimony of Clarence Sadler.)

as would appear from the pleadings and what we have had so far, their interests would be identical and these statements contained [193] in these letters, that part of the letters that refer to the ranch, to my mind could be considered as declarations against interest.

Mr. Cooke: Could I be heard a moment, your Honor?

The Court: Yes.

Mr. Cooke: Declarations against interest, I think we will concede, must be made by the party but that does not change the rule of evidence as to hearsay. Here we are not questioning but what Alfred was co-grantee in that deed, that he is a co-tenant with Edgar Sadler in the ranch. That is not questioned anywhere. I think counsel got another conception of some portion of our answer, but that is readily explained by reference to Exhibit "L." They were simply co-tenants, your Honor. Now in that relation they are no different—I suppose your Honor has had an interest with prospectors and grubstakes in mines. I have had a dozen or more of that type of partners around in the hills or elsewhere. They are co-tenants in mining property. I admit they are co-tenants. They have as much interest as I have and in some cases more interest, but I mention that as showing the relation of co-tenancy is not one of confidence or trust. Alfred Sadler could sell his interest in that property if he wanted to and inject some knew co-tenant. The relation of trust and confidence does not exist.

(Testimony of Clarence Sadler.)

In the case of mining partners of mine, they could sell their interest there and I would be confronted with some partner who could be ignorant or what not, have no say in selecting him, and hence the rule there is no relation of trust as between co-tenants, as Wigmore says, and no authority of one to bind the other and the same applies, of course, in the matter of co-trustees. Whether they are co-trustees here is the question we are litigating. We cannot very well assume that that relation is already proved for the purpose of admitting evidence of one of the trustees, but in their view, if it were admitted, if we concede that Alfred was a trustee as to the ranch and cattle and everything that could be claimed, it still leaves a case where his declarations are not legal evidence against Edgar, nor would Edgar's be legal evidence against him. We find the same illustration of a lack of the quality that is necessary, for instance, in a partnership relation where they select each other. Right in this case here, under the law, Kathryn Powers Sadler is a co-trustee with Edgar Sadler as to the ranch. She is that by reason of being a successor to the trustee.

The Court: I do not think so.

Mr. Cooke: Well, they have assumed that, your Honor.

The Court: I think I pointed that out in the opinion in the case on the motion to align the parties.

(Testimony of Clarence Sadler.)

Mr. Cooke: Well, be that as it may, the authorities are to that effect, your Honor, and this District Court so [195] held in a former case, in this Maitia case. I was with that case from start to finish and an administratrix of the deceased person automatically took charge of the property, pending appointment of some other person on motion of the beneficiaries or on application of the court or the like, but until that was done, I think it was the law, with all due respect to your Honor's view, to have that legal representative of the deceased trustee take charge of the property.

The Court: In a case of co-trustees.

Mr. Cooke: Well, yes, it doesn't make any difference.

The Court: It is not my understanding of the law.

Mr. Cooke: Well, I have not looked up that particular phase of it as to co-trustees. I say it would make no difference. Alfred Sadler was appointed there and he represented certain interests and those certain interests were entitled to have their trustee and not be foisted over by operation of law on to Edgar, so that would be filled by law, I think, by the administratrix of Alfred Sadler, subject to the right of the beneficiaries to oust that particular person and have somebody of their own selection. But I think we are going a little afield on that thing. Counsel states the reason for this evidence is not, as I understand, for the purpose of proving or tending to prove the existence of a

(Testimony of Clarence Sadler.)

trust, but for the purpose of anticipating the defense or excusing the apparent laches of [196] the plaintiff in this case, but I respectfully submit that that answer does not explain and does not answer, because you still have to have legal evidence. Anything that Edgar Sadler said to Clarence Sadler, by way of lulling him into a sense of security, of telling him, in effect, "Don't start anything, I will take care of this and I know you are interested," or anything of that sort, would be legal and satisfactory evidence establishing excuse for the long delay in connection with the suit, but to say that he can bring in hearsay statements of another brother or a stranger or of one in the position of Alfred Sadler, who is a co-trustee, co-tenant, that he can bring in hearsay evidence for the purpose of excusing his gross delay, is absolutely inconceivable because you have to have legal evidence and for Clarence Sadler to put these letters in evidence, correspondence between him and his brother, Alfred, that Edgar didn't know anything about and then say he relied upon those that they didn't bring the suit against Edgar, is an abandonment of the legal principle that evidence must be resortable to the party to be charged. That is why I still insist, if the Court please, that under no conceivable theory that the law recognizes can these hearsay statements and evidence be admissible.

The Court: The objection will be overruled and exhibit admitted in evidence as Exhibit 33. [197]

(Testimony of Clarence Sadler.)

PLAINTIFF'S EXHIBIT No. 33

Reno, Nevada

Aug. 6, 1925

Dear Clarence:

Your letter and Reba's post card received and pleased to learn that you and she enjoyed the visit to the ranch. I judge that you found out from Edgar how things stand. It appears to me that if he is only getting 400 tons of hay that the meadows need re-seeding as a 1000 tons of hay should be cut on the ranch.

I judge that if Hermann said he is not interested in the Mines, you want to get him to write you and tell Edgar so that Edgar can sell them. I think that if he can get \$8400 for some of the mines he had better sell the same. Because paying taxes and keeping up the assessment work is just a drain. Therefore if Herman told you he did not consider they they were interested, have him write Edgar and say so. Otherwise Edgar will have to go thru the process of advertise them out. I told Edgar he should have done this over two years ago. It is foolish to wait if Edgar has a chance to sell some of the mines for \$8400. Because as mining is now nothing looks as if the same is going to pick up. I say better sell. Glad to learn that you were able to get an apartment in Salt Lake City so that you expenses would not be so high. I hope you will be

(Testimony of Clarence Sadler.)

able to get an apartment in Boise. The snapshots you sent seem to be real good and everybody looks well and happy. I judge that you found Eureka a bad looking town and not much doing in the same. Going down every year. The Italians seem to own the town and no doubt hard to find a hotel unless run by an Italian.

No I am not thru with Jury duty; during the month of August no cases will be tried but cases start again in September and whether I am called remain to be seen. I have not been excused as yet. Mr. Cessna is going for a three weeks Auto trip up to Seattle and Canada. He starts about August 10.

We have not heard anything as yet in regard to our positions from Washington, It seems to be that they are all muddled up and do not know what they are doing.

I see by the papers that the President does not favor during away with the Federal Trade Commission but judge there will be a fight in Congress over the same in December.

The races are closed here and the papers claim that the concern lost money during the meet because the public did not take to the same. We have been having some real warm weather since you visit here and the same seems to continue. Plenty of people are going by Autos to the coast and mountains to get away from the same therefore the town is some what dull and quiet,

(Testimony of Clarence Sadler.)

When you write Herman do not say anything about that Edgar wants to sell or otherwise everything will be tied up again. They have stock in the company that father formed as you found out from Edgar. I guess Edgar has mother's and father's stock in the bank in Eureka. I judge that \$800 we found in the trunk after mother's death was the remainder from Prospect Mountain Tunnel Stock. If I remember Correctly there was 13000 shares of stock and sold for \$.15 per share. The same was paid in installments. I do not remember what year the deal was made but no doubt Edgar does. I thought that Bertha and mother wrote you about the same when the transaction took place.

Nothing new happening in this section therefore close with love and kisses to both of you.

You want to keep after Edgar so that the mines will be sold otherwise nothing will come from same.

As ever

/s/ ALFRED

[Endorsed]: Filed Oct. 16, 1946.

Q. Mr. Sadler, after 1931 did you have any further conversations with Edgar Sadler?

A. I did.

Q. And when did the first of those conversations occur?

A. They occurred in March, 1933.

Q. Where were you at that time?

A. In Reno, at the Golden Hotel.

(Testimony of Clarence Sadler.)

Q. Was any one else present?

A. Alfred Sadler.

Q. There were the three of you there at that time, yourself, Edgar Sadler and Alfred Sadler?

A. That is correct.

Q. And what was the conversation that occurred at that time?

A. At that time both Alfred and I offered to sell our interests in the Diamond Valley Ranch to Edgar for six thousand dollars apiece and Edgar said that was a fair price and on his return to the ranch or to Elko he would talk to Mr. Hatch, the local agent of the Berkeley Farm Bank, and try to arrange for an additional loan upon the ranch.

Q. Mr. Sadler, I show you Plaintiff's Exhibit 34 for identification. Will you state what that is please?

A. It is a document I received from Alfred Sadler by United States mail. It is dated September 15, 1933, and it is addressed to "Dear Alfred" and signed "Edgar."

Q. In whose handwriting is it? [198]

A. It is in the handwriting of Alfred Sadler.

Q. Whose signature appears at the bottom?

A. At the bottom of the letter appears the name Alfred and Alfred's signature, handwriting.

Mr. Thompson: I offer Exhibit 34 for identification in evidence, your Honor.

(Testimony of Clarence Sadler.)

Q. (By Mr. Cooke): In whose handwriting is the body of that letter? A. Alfred's.

Q. I notice at the top it says, "Copy of Edgar's letter." Do you know anything about what that had reference to?

A. I presume it is copy of letter that Edgar wrote to Alfred.

Q. You understand that Alfred copied the letter that he received from Edgar and this is the copy?

A. That is my inference. I don't know; I never saw the original document.

Q. When did you first know of the existence of this copy? A. When did I know of it?

Q. When did you first know of it?

A. I have had it in my possession all of these years.

Q. Ever since it was written in 1933?

A. Yes, sir.

Q. Did you ever make any effort to find the original?

A. No, sir. I received it from my attorney in fact. I presumed he gave the facts correctly. [199]

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission of the offer in evidence on the ground no proper foundation has been laid. It appears to be nothing but a copy, or claimed to be a copy, of some other letter and no satisfactory explanation made of the absence of the original. This document here is not signed by Edgar and that evi-

(Testimony of Clarence Sadler.)

dence of itself, the contents of itself, do not constitute any evidence excusing this plaintiff for the delay of some twenty odd years or more in bringing the action. There is nothing in the letter to lull him into any sense of security, so it is not admissible for that purpose.

The Court: What have you to say about this, Mr. Thompson?

Mr. Thompson: If the Court please, we are not required to account for any original in this instance. As far as Clarence Sadler is concerned, that is the original. That is the document he received from Alfred Sadler, which states it is a copy of the letter from Edgar and he copies the letter and then at the bottom of that paper there is the signature of Alfred Sadler and it ties in directly with the testimony of the conversation had regarding the property in March, 1933, to which the witness has testified. It is a business communication from one trustee to the beneficiary. So far as Alfred Sadler is concerned, it constituted a declaration against interest as to him. It also constitutes a report to a beneficiary of a trust. [200] I have never heard the rule of law to be that when two co-trustees live 500 miles apart it is incumbent upon the beneficiary to get them together in one room before he does any business with them.

The Court: Objection will be overruled and exhibit admitted in evidence as Plaintiff's Exhibit No. 34.

(Testimony of Clarence Sadler.)

PLAINTIFF'S EXHIBIT No. 34

Department of the Interior
General Land Office

Office of the Supervisor of Surveys
Railroad Building, Denver, Colo.

—copy of Edgar letter—

Eureka, Nevada,
Sept. 15, 1933

Dear Alfred:

Received your letter and contents noted in letter will go up to Elko in a few days as soon as we get second crop of hay up, and go see those people, But do not think I can get that much money as they are slow in letting loan up this way on ranches. But will try them again. Have been talking to them before but will apply for the same and see what I can get, everything tight up here no money for anything. Money for taxes is scarce and hard to get. Things look bad. Hard to make and save money for interest, taxes and enough to eat. With love to all.,

Your brother,

/s/ EDGAR.

“send to Clarence”—

/s/ ALFRED.

Love to all from us and the children—

[Endorsed]: Filed Oct. 16, 1946.

(Testimony of Clarence Sadler.)

Q. (By Mr. Thompson): Mr. Sadler, when next did you have a conversation with Edgar Sadler? A. It was in October of 1933.

Q. Where were you at that time?

A. I was at the Diamond Valley Ranch.

Q. In Eureka, Nevada?

A. That is correct.

Q. What was the occasion of your being in that vicinity?

A. I was making an investigation for the Federal Trade Commission involving the wool industry and I stopped en route to Ely at Eureka and went down to the ranch.

Q. Did you have a conversation with Edgar Sadler at that time? A. I did.

Q. Was any one else present?

A. Not that I recall.

Q. What was the conversation, as you recall it?

A. The conversation was with regard to an application for a loan from the Federal Farm Bank. At that time Edgar said he had [201] talked to Hatch, the local representative in Elko, and that Mr. Hatch had told him that the jurisdiction of that office had been conferred on the Salt Lake office and that his information, that is Mr. Hatch's information, was that the Salt Lake office was strictly against making further loans on property and Mr. Hatch recommended to Edgar that no application be made for an additional loan. Edgar also pointed out that the price of farm lands had decreased so materially that it was very improbable whether a rea-

(Testimony of Clarence Sadler.)

sonable price could be obtained for the ranch if it were sold.

Q. I show you Plaintiff's Exhibit No. 35 for identification, Mr. Sadler. Will you state what that is, please?

A. It is a letter dated November 23, 1933, addressed to "Dear Clarence" and bears the name "Alfred." It is in the handwriting of Alfred Sadler and signature is in his handwriting.

Q. There are some figures on the back of the last page of Exhibit 35, do you know anything about those?

A. Yes, those are my own personal figures. I was working on some problem, I presume, and put the figures down.

Q. They were not on the letter when you received it?

A. No, sir. Those are in my handwriting. I received this letter in the mail at the office.

Mr. Thompson: We offer Exhibit 35 for identification in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to [202] the admission in evidence of Plaintiff's Exhibit 35 for identification, on the ground it is hearsay as to the defendant, Edgar Sadler; no proper foundation has been laid for its admission in evidence; that it is irrelevant and immaterial in any event and that the contents do not show, or tend to show that it is from one co-tenant to another. That there is nothing in it that would constitute, or tend to constitute, any reason or grounds for delay on the part of Clarence Sadler in season-

(Testimony of Clarence Sadler.)

ably commencing his action, if he had any cause of action. We repeat the objection we made to the preceding offer without repeating it at this time.

The Court: Same ruling. The letter is admitted in evidence as Plaintiff's Exhibit 35.

PLAINTIFF'S EXHIBIT No. 35

Reno, Nevada

Nov. 23, 1933

Dear Clarence:—

Just a few lines to let you know how things were going up in this section. No action as yet in regard to the Banks. Al thro the Riverside Bank paid a dividend of 20% to the depositors. The Bank of Sparks paid a dividend of 10%. The rest of the Wingfield Group are still in the courts.

Edgar is paying a visit here in Reno, the main object he is down for is to get a pair of glasses for himself.

He was over to Elko the latter part of October and saw Mr. Hatch about the loan. It seems that instead of a man from Berkeley coming to look in the matter, the government has sent a man from Salt Lake, this new man seems to be turning down the applications for loans.

As yet no man has come to the ranch to look into the matter. But Mr. Hatch told Edgar that the man from Salt Lake was turning things down right and left.

Edgar told me that the Henderson bank was offering a property with 500 head of cattle and the ranches, which comprise over 4,000 acres for \$50,000.

(Testimony of Clarence Sadler.)

He said conditions was very bad in Elko Co., the trouble now about the loan seems to be in regard to the Ranges that the different farmers claim of the Public Area, unless this matter is straightened out it will be a question of getting a loan.

Edgar says that he will go again on his return over to Elko and see Mr. Hatch.

Edward wants to thank, Bruce, Reba and yourself for the \$2. The same will be spent for something he needs. We did not give him a birthday party this year.

Floyd is still working on a government survey party out near Round Mountain, Nevada. As soon as the weather conditions get bad no doubt he will be laid off, unless something else turns up. We have been having real nice fall weather up in this section so far, the morning and evenings are chilly and one needs a fire to take the chill off the house.

Helen is working part time in regard to the Beauty business, If she earns about \$6 to \$8 per week.

Nothing else of anything of real importance happening in this section. The lawyers and business men are all complaining about conditions. The real estate men and people that rent property are having a hard time get rent or renting the property. Plenty of vacant places in Reno but it seems they do not want to come down on rent and seem to let the places remain vacant.

With love and kisses from us all to you all.

Your Brother,

ALFRED.

(Testimony of Clarence Sadler.)

	1450	
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	100	
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	352.50	
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	2626.00	
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30	5176.00	16
10		61
6	5175	30
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12.50		107
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	5200	
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[Endorsed]: Filed Oct. 16, 1946.

(Testimony of Clarence Sadler.)

Q. (By Mr. Thompson): Mr. Sadler, I show you Plaintiff's Exhibit 36 for identification. Will you state what that is?

A. That is document dated December 8, 1933, addressed "Dear Clarence."

Q. And signed?

A. It is unsigned. It is in the handwriting of Alfred R. Sadler.

Q. How did you first receive that?

A. I received that by mail.

Q. As part of the exhibit there is an envelope under the letterhead of Eureka County Farm Bureau, Eureka, Nevada, with the name E. Sadler in the upper left-hand corner, addressed to [203] Mrs. Edgar Sadler, 418 University Avenue, Reno, Nevada. Do you recognize that handwriting?

A. I do.

Q. Whose handwriting is it?

A. Edgar Sadler's.

Q. Enclosed in the envelope is a typewritten copy of the letter dated November 22, 1933, addressed to Mr. Edgar Sadler, Eureka, Nevada, with the signature L. F. Hatch typed in. Was the envelope received through the mail with the letter in Alfred's handwriting dated December 8, 1933?

A. It was.

Q. And was the copy of the letter dated November 22, 1933, enclosed in the envelope?

A. It was.

(Testimony of Clarence Sadler.)

Q. On the back of the envelope are some figures in pencil. Whose figures are they, do you know?

A. Those are mine.

Q. They were placed there by you?

A. They were.

Q. Were they on the envelope at the time it was received by you?

A. No. I can tell you what those figures represent if you care to know. Those figures represent payments on my house and amount of interest for the purchase of my house.

Mr. Thompson: I offer Exhibit 36 for identification [204] in evidence, your Honor.

Q. (By Mr. Cooke): Mr. Sadler, on the typewritten letter of November 22, 1933, and copy from Mr. Hatch to Mr. Sadler, I note down at the bottom, "Sadler's note on this letter is as follows" with green brackets, how did those get on there?

A. I don't know.

Q. It was that way when you got it?

A. That is correct.

Q. I note the letter addressed "Dear Clarence" in the handwriting, as you stated, of Alfred, dated December 8, 1933?

A. Yes, sir.

Q. And the envelope you say contained it. Did you notice the postmark on that?

A. December——

Mr. Thompson: That is not his testimony. He didn't say that letter from Alfred Sadler was contained in that envelope. He said the copy of the letter from Mr. Hatch was contained in that envelope.

(Testimony of Clarence Sadler.)

A. This envelope bears the postmark December 5, 1933, and Alfred's letter bears December 8, 1933.

Mr. Cooke: I see that.

A. Undoubtedly that was mailed to Mrs. Sadler from Eureka and she in turn—this is just presumption on my part—and she in turn turned the letter over to Alfred, who copied it.

Q. And then he sent it to you? [205]

A. That is what I presume. Now you have as much knowledge about it as I have.

Mr. Thompson: That is what is stated in Alfred's letter, is it not?

A. I haven't read Alfred's letter.

Q. (By Mr. Cooke): How did the envelope addressed to Mrs. Edgar Sadler and the envelope dated December 5, 1933, how did they come to you? How did you get it?

A. It was enclosed with Alfred's letter.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of the offer designated Plaintiff's Exhibit 36 for identification, on the ground that it is merely a letter from one brother to another. It is not shown to have been written by or at the authority of Edgar Sadler or that he had any knowledge of the letter from Alfred Sadler to Clarence Sadler; that the enclosure of the purported copy of the letter from L. F. Hatch to Edgar Sadler, no proper foundation for that, in fact, the original has not been called for and no reason given why the original, if it exists, has not been in evidence instead of the paper purporting to be

(Testimony of **Clarence Sadler.**)

a copy. That it is hearsay as to the defendant, Edgar Sadler. That there is nothing in the document that could legally establish, or tend to establish, a trust and nothing in the document that legally or at all would excuse the plaintiff from seasonably commencing action on his alleged cause of [206] action. It is not admissible for any purpose.

The Court: Objection will be overruled and exhibit admitted as Plaintiff's Exhibit 36.

PLAINTIFF'S EXHIBIT No. 36

L. F. Hatch

Will Bond And Insure You

Real Estate

Elko, Nevada

November 22nd, 1933.

Mr. Edgar Sadler

Eureka, Nevada.

Dear Mr. Sadler:—

Referring to your letter of November 6th, 1933, and also to the letter your brother wrote you and which you left with me, I would advise that you do not attempt to put an increased loan on your property at this time.

The new applications that have been appraised in the last two months, in many cases have been cut severely and a number have been rejected. In some cases land which had a good crop of hay growing was appraised as low as \$30 per acre, this means

(Testimony of Clarence Sadler.)

that only \$15.00 per acre would be loaned. Common old grazing land, even under fence, went as low as fifty cents an acre.

Maybe we will have some rain and by next year the appraisals will be more liberal.

I am

Yours truly,

/s/ L. F. HATCH.

L.FH: PO'N

(Edgar's note on this letter is as follows: You can see what they say about it. Cannot borrow at that rate; better give the property away.)

Dec. 8, 1933.

Dear Clarence:

Ethel brought this letter over to the house so I could read it. She left it there so I made a copy of it, to send you.

She told Kathryn that Edgar wanted it back. Therefore I judge he will not get a loan further on the ranch.

Ethel told my wife that Reinhold and his wife did not go to the Thanksgiving Dance in Eureka because they did not have cash money to buy a ticket. Conditions tough and they have sold no cattle as yet.

(Testimony of Clarence Sadler.)

(Copy of Envelope)

Eureka County Farm Bureau

Eureka, Nevada

E. Sadler

Eureka

(stamp)

10

Dec 5

1933

Mrs. Edgar Sadler

418 University Ave

Reno, Nevada

21.74		2500	
21.61		400	
21.50	60	200	
21.39	50	253.33	
21.28	30	35.22	280
21.18	20		
21.07	2		
20.96			
20.85			140
20.74			
20.62			1400
20.39			

33

253.33

1000

4

4000

(Testimony of Clarence Sadler.)

Q. (By Mr. Thompson): Mr. Sadler, I show you Plaintiff's Exhibit 37 for identification. Will you state what that is, please?

A. That is a letter dated October 9, 1937, addressed to "Dear Clarence" and signed by Alfred. It is typewritten and the signature is in the handwriting of Alfred Sadler and it was received by me through the mails.

Mr. Thompson: I offer Exhibit 37 for identification in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of Plaintiff's Exhibit 37 for identification on all and singularly the grounds stated in our previous objection to Exhibit No. 36, without taking time repeating it.

The Court: Same ruling. The exhibit will be admitted as Exhibit 37.

PLAINTIFF'S EXHIBIT No. 37

Reno, Nevada

October 9, 1937

Dear Clarence:—

I have not heard from Edgar in regard to my letter.

I asked him what was the amount of mortgage held by the Federal Land Bank on the property.

How many head of cattle he sold this fall. Nothing in regard to buying us out, as yet. Ethel said in her letter that the boys did not have any money to buy.

(Testimony of Clarence Sadler.)

I judge the he is sort of sore that I said he was getting along in years and might want to live in some city or town. They just finished haying the other day and put up a very fair crop of hay. Enough so there would not worry of feeding the stock this winter and spring.

I have not been able to make a visit to the ranch as yet but hope too later and secure more by talking to him. He does not care to do any writing.

Kathyran has a very bad cold and has been feeling pretty bad. The children are enjoying good health and going to school every day.

We have very nice fall weather now up here. I hope that Reba, Bruce, Shirley and yourself are all in good health. The papers said there was a nice rain down in that section.

Nothing of any special news of real importance happening up in this area.

With love and kisses from us all.

Your brother,

/s/ ALFRED.

[Endorsed]: Filed Oct. 16, 1946.

Q. I show you Exhibit 38 for identification, Mr. Sadler. Will you state what that is?

A. The first document is a letter dated October 18, 1937, addressed to "Dear Clarence," signed "Alfred." It is typewritten and the signature is in Alfred Sadler's handwriting. Accompanying it is a letter dated October 15, 1937, addressed "Dear Al-

(Testimony of Clarence Sadler.)

fred" and signed "Edgar." It is in the handwriting of [207] Edgar Sadler and the signature is in his handwriting.

Q. How did you receive this?

A. I received this through the mail.

Q. In one envelope?

A. In one envelope, yes. They were attached.

Mr. Thompson: I offer Exhibit 38 for identification in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of Plaintiff's Exhibit 38 for identification, consisting of typewritten letter dated October 8, 1937, from Alfred to "Dear Clarence" and yellow sheet dated October 15, 1937, signed "Edgar," addressed to "Dear Alfred," upon the ground and for the reason that the same is incompetent and immaterial, so far as any bearing on the defendant is concerned, that it does not tend to prove or establish any trust, does not tend to prove or establish any reason for the delay of the plaintiff in not seasonably commencing his suit on his alleged cause of action. That the letter from Edgar simply purports to be a statement to his co-tenant in the ranch as to the chance of borrowing money on the ranch and he is making this report to Alfred as to his lack of progress in getting the money, talking about how hard it is to get the money, and that is all there is to that. The point I am making there, there is no recognition of any sort of any interest that Clarence Sadler had. There

(Testimony of Clarence Sadler.)

is, of course, the recognition, if [208] any was needed, that Alfred was a co-tenant in the ranch. He is writing to him about buying out his interest in the ranch, but we submit all of that, and any of that, no matter how many letters might be piled on, is no excuse for the otherwise unseasonable delay of the plaintiff in this case commencing the suit. It is not admissible for any reason material in this case.

The Court: Objection will be overruled and the exhibit admitted in evidence as Exhibit 38. We will take our recess until 2:00 o'clock this afternoon.

PLAINTIFF'S EXHIBIT No. 38

Reno, Nevada

October 18, 1937

Dear Clarence:

Herewith is the letter that I received from Edgar relative the Ranch.

He has not sold any Cattle but waiting for a better price.

In fact the situation is, he has to get the O.K. from the Loan Bank before he can sell.

There are a few of the big ranches up in that section that is being sold by either the Federal Bank or by the Receiver of the banks that went under in 1932.

The weather up in this area is fine. There was a little snow on the tops of the Mountains last week.

Conditions are somewhat quiet up in this town and look as if a slump is ahead of us.

(Testimony of Clarence Sadler.)

Kathryan has a bad cold and it seems that she can't break the same. The children are enjoying fair health and going to school.

I hope that Reba, Bruce and Shirley and yourself are enjoying good health.

Nothing else of any special interest taking place up here therefore will close with love to all.

From your brother,

ALFRED.

Sadler Ranch

Oct. 15, 1937

Dear Alfred:

Received your letter last week about some information about ranch. The Federal Bank loan was \$18,000, now it is \$12,225.76 which we have to pay \$790 in a year and \$720. taxes but has been cut down on interest in the last year, and not any toward the principal was paid but it will have to be paid again soon, and did not get any from them for cattle to pay. You know yourself that it has been hard to get any money anywhere to do anything for the last 7 years, and am in luck to get by as I did. The bank took all the other places and still selling them out and you can buy all the ranch you want and good one at that for a small sum. I have not seen any cattle buyers yet as there has been a slump in everything hope to get a good price for them.

Your Brother,

EDGAR.

[Endorsed]: Filed Oct. 16, 1946.

(Recess taken at 12:00 o'clock.)

Afternoon Session, October 16, 1946

2:00 P.M.

Appearances as at morning session.

MR. CLARENCE SADLER

resumed the witness stand on further direct examination by Mr. Thompson.

Q. Mr. Sadler, I show you Plaintiff's Exhibit 39 for identification. Will you state what that is, please?

A. That is a letter dated September 24, 1937, addressed to W. R. Hooper, Assessor of Eureka County, Eureka, Nevada, and it is a typewritten letter and the signature of Alfred R. Sadler is typed and on the lower part of the letter is a statement in lead pencil in the handwriting of Alfred R. Sadler. [209]

Q. How and when did you receive that Exhibit 39?

A. This letter, the document, was received shortly after September 24, 1937, by me through United States mail.

Q. From whom?

A. It was received from Alfred Sadler.

Mr. Thompson: I offer Exhibit 39 for identification in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of Plaintiff's Exhibit 39 for identification for each and all of the reasons stated in the objections to previous exhibits, particularly Nos. 36, 37, and 38, to the same effect as if now repeated.

(Testimony of Mr. Clarence Sadler.)

The Court: Same ruling. It will be admitted in evidence as Exhibit 39.

PLAINTIFF'S EXHIBIT No. 39

Reno, Nevada

September 24, 1937

Mr. W. R. Hopper
Assessor of Eureka Co.,
Eureka, Nevada.

Dear Sir:

Kindly send me a Copy of the Tax List of Eureka County for the year of 1937.

Desire to check on some of the Mining Claims that have been "Patented" in said County.

I understand that a Canadian Company is doing quite a amount of work in that section.

Very truly yours,

ALFRED R. SADLER.

P. O. Box 433,

Reno, Nevada.

Clarence soon as this tax list comes, I will send same to you. I wrote a letter on my return saying it was reported they sold 800 head of cattle at \$60.00 per head. And asked him what his plans were now going to be about the ranch, whether the boys were going to run the ranch. You see the letter that came back. And if he would buy our interest in the same.

[Endorsed]: Filed Oct. 16, 1946.

(Testimony of Mr. Clarence Sadler.)

Q. Mr. Sadler, when next did you see Edgar Sadler?

A. The next visit to the ranch at the time I saw Edgar was in October, 1938.

Q. And who was with you at that time?

A. Mr. Geo. D. Casto, an associate of mine in the Federal Trade Commission of the San Francisco office.

Q. At that time did you have any conversation with Edgar Sadler regarding the ranch?

A. I did.

Q. And where did the conversation take place?

A. I believe it took place in the ranch house at the Diamond [210] Valley Ranch in Eureka County.

Q. Who was present during the conversation?

A. As I recall, Edgar and myself.

Q. What was said at that time?

A. I asked Edgar if there was any chance to dispose of the ranch and he said that ranch property at that time was being offered at ridiculously low prices and he said he doubted whether he could get a reasonable price for the ranch and he also mentioned the fact that a number of cattle raisers had lost a number of cattle on account of government order to dispose of cattle on account of some disease. I think it was mouth disease or hoof disease.

(Testimony of Mr. Clarence Sadler.)

Q. When next did you see Edgar Sadler?

A. The next time I saw Edgar Sadler was, I believe, in the spring or summer of 1939, shortly after the death of Tom Hicks, the brother of Ethel Sadler.

Q. And where did you see Edgar Sadler at that time?

A. Edgar Sadler and Ethel Sadler and Rebecca, a sister of Ethel Sadler's visited us in our home at Berkeley, California.

Q. Did those three stay in your home?

A. Rebecca stayed there for two or three days, possibly two days, and then left for Reno. Edgar and Ethel Sadler continued there to visit. The Fair was in operation and they wanted to stay there and continue and see the sights.

Q. During that visit to your home was there any discussion [211] of the ranch?

A. There was.

Q. Who was present at that time?

A. Edgar Sadler, Ethel Sadler, my wife Doris Reba Sadler, and myself.

Q. What was the substance of what was said, as you recall it?

A. We asked Edgar if there was any chance of putting the ranch on the market and selling it. He pointed out it was a bad time, inasmuch as property values were low. He doubted whether he could get a reasonable price.

Q. Do you recall any more of that conversation?

(Testimony of Mr. Clarence Sadler.)

A. We also asked him—I did—if the boys, his sons, Floyd and Reinhold, would be interested in buying Alfred and my interest in the ranch.

Q. Did he make any reply to that?

A. Well, he didn't make any direct reply that I can recall. At that time Floyd had returned to the ranch, as I recall it.

Q. Do you recall the time of Alfred Sadler's death? A. I do.

Q. Do you remember the date of his death?

A. The date of his death was on March 5, 1944.

Q. At that time did you come to Reno, Nevada for his funeral?

A. On the morning of the 5th, about two o'clock in the morning, I received a telephone call from Reno announcing that Alfred had passed away and asking if I could come up immediately [212] and I explained to the party that it would be impossible to come that day, inasmuch as there were no trains to Reno and that I couldn't drive over the summit with my car on account of the snow, but I advised them I would come up on the night train and I arrived here next morning, on March 6th.

Q. On the evening of March 6, 1944, were you present in the home of Kathryn Sadler?

A. I was.

Q. And who else was present at that time?

A. Kathryn Sadler, Edgar Sadler, Ethel Sadler, Patricia Sadler, Edward Sadler and I believe George Sadler was sitting in the kitchen. We were all sitting in the living room.

(Testimony of Mr. Clarence Sadler.)

Q. Who is George Sadler?

A. George Sadler is the son of Alfred Sadler.

Q. Do you know how old he is?

A. Well, I would say he is around 16 years of age.

Q. Who is Patricia Sadler?

A. Patricia Sadler is a daughter of Alfred Sadler.

Q. Also the daughter of Kathryn Sadler?

A. Yes.

Q. Is that also true of George Sadler?

A. Yes.

Q. He is the son of Kathryn Sadler?

A. Kathryn, yes.

Q. How old is Patricia Sadler? [213]

A. Well, I would say Patricia is a little past 18, going on 19. She is about a month older than my boy.

Q. Who is Edward Sadler?

A. Edward is the son of Alfred Sadler and Kathryn Sadler.

Q. About how old is he?

A. I think Edward is about 20 years of age.

Q. Were all those persons present at that time?

A. As I recall it, yes.

Q. And at that time did the discussion regarding the Diamond Valley Ranch arise? A. Yes.

Q. Edgar Sadler was present?

A. He was.

Q. What was said?

A. I asked Edgar, I said, "Edgar, now that we

(Testimony of Mr. Clarence Sadler.)

are all here, let's see if we can make some arrangement as to disposition of the ranch."

Q. Did he make any reply to that suggestion?

A. He did.

Q. What did Edgar Sadler say?

A. Edgar Sadler said I didn't own any interest in the ranch.

Q. Prior to that date had Edgar Sadler ever made any similar statement to you? A. No.

Q. Do you recall the conversation which you testified to which [214] took place at the Diamond Valley Ranch in July, 1945? A. I do.

Q. At that time did Edgar Sadler say to you that you didn't have anything to do with the ranch?

A. Not as I recall, no.

Q. Did he ever at that time make a statement of similar import to you? A. No.

Q. Do you recall the conversation that you had at the ranch in October, 1938? A. I do.

Q. At that time did Edgar Sadler say to you that you didn't have anything to do with the ranch?

A. No.

Q. Did he make any statement to you of similar import? A. No.

Q. How long have you been employed in the Federal Trade Commission, Mr. Sadler?

A. Well, I was appointed to the Federal Trade Commission on August 3, 1917 and I have been in its continuous employment since that time. On November 14, 1941 I was appointed attorney in charge of the San Francisco office and have been serving in that capacity since that time.

(Testimony of Mr. Clarence Sadler.)

Q. Do you have a profession? A. Yes.

Q. What is it?

A. Attorney. I was admitted in the State of Nevada in 1916.

Q. Do you and your wife, Doris Reba Sadler, have any children? A. We have two.

Q. What are their names and ages?

A. Bruce Phillip Sadler is going on 19 and Shirley Louisa Sadler is going on 13.

Mr. Thompson: You may cross-examine.

Cross-Examination

By Mr. Cooke:

Q. Did you ever live on the ranch in Eureka County?

A. No sir, I have never lived on the ranch. I have spent several summers there.

Q. Those were just visits, weren't they, Mr. Sadler?

A. In a way visits and prior to the time I went to sea I helped with the hay crop.

Q. What year did you go to sea?

A. I went to sea in 1913.

Q. Since 1918 your visits to the ranch have been those that you already testified to, is that right?

A. That's correct.

Q. One in 1925 and one in 1938?

A. And one in 1933.

Q. Three visits? A. That is correct. [216]

Q. And the one in 1925, was that the one where you were on your way to Salt Lake and you stopped off there? A. Yes sir.

(Testimony of Mr. Clarence Sadler.)

Q. How long did you stop off?

A. Well, I think we spent three or four days at the ranch.

Q. Who are "we"?

A. My wife and myself; and while we were there we went duck hunting.

Q. How much of the time while you were there did you spend duck hunting?

A. We went out twice and we also went sage hen hunting too. We went over to the Henderson ranch one day and twice we went down in the meadow for ducks one day and the third morning went over to the Henderson ranch.

Q. What was the Henderson ranch?

A. Formerly belonged to my father.

Q. To whom did it belong in 1925?

A. I don't know. I presume it was part of the Huntington & Diamond Valley Land & Stock Company.

Q. Not part of the Diamond Ranch?

A. No sir. It was in a different range, over the mountains.

Q. And on the occasion of your visit in 1933 was the one where you stopped off on your way to Salt Lake City?

A. I stopped on my way to Ely.

Q. You went on from there to Salt Lake City however, did you [217] not?

A. Eventually I went to Salt Lake, yes.

Q. Who was with you on that occasion?

A. No one.

(Testimony of Mr. Clarence Sadler.)

Q. Were you driving through the country in a car? A. Yes, sir, that's correct.

Q. You had business at Ely and at Salt Lake on that occasion?

A. I had business at Eureka and at Baker, Ely, and Salt Lake, Ogden, various points in Idaho and other towns in Nevada. I was making an investigation for the Federal Trade Commission regarding the wool industry.

Q. And you stopped off at the ranch and how long did you stay on that occasion?

A. Well, as I recall it, possibly two or three hours. I think I left Reno in the morning and I drove out there and then continued on to Ely. I got into Ely late that night, about 10 o'clock, because I had a flat tire and I went in on the rim.

Q. You say you think you spent about two hours on the ranch? A. Two or three hours.

Q. The ranch house is some little distance from Eureka?

A. Thirty miles north of Eureka.

Q. And you were alone on that occasion?

A. That is correct.

Q. Who did you see at the ranch? Who are all the persons [218] you saw at the ranch when you got there on that trip?

A. Well, I believe Reinhold was there with his wife and Ethel was there and Edgar and possibly two or three other employees.

Q. Ethel, was she there?

(Testimony of Mr. Clarence Sadler.)

A. I don't know whether she was there or not, I am not positive, because my conversation at that time was with Edgar, as I recall it.

Q. Where did your conversation at that time take place?

A. It took place in the house or on the front porch.

Q. Which do you mean, in the house or on the front porch?

A. I don't recall exactly, but I think it was in the house, I am not sure.

Q. Who were present beside yourself and Edgar?

A. Edgar and myself were the only ones present at the conversation.

Q. This is the 1933 conversation?

A. That is correct.

Q. And that talk lasted about how long, Mr. Sadler?

A. Well, I would say it didn't last over 10 or 15 minutes at the most.

Q. Did you talk with him about any other subject beside the ranch subject?

A. Yes, I talked about the wool investigation. He was very much interested in the wool investigations. I asked him who would be some good sheep men to call on and he suggested Mr. [219] Florhill in Eureka County. He says, Mr. Florhill runs sheep in Nye County in the wintertime and Eureka County in the summertime."

(Testimony of Mr. Clarence Sadler.)

Q. It is a fact, is it not, that you and Alfred and Edgar and the children of Reinhold Sadler, Sr., were interested as heirs in some mining property in Eureka? A. That is correct.

Q. Did you talk with Edgar about mining claims, chances to sell them?

A. I may have talked to him about them because we were interested in some properties on Adams Hill, and I don't know whether this conversation took place with Edgar or when the others were present, about the mine.

Q. And the conversation as a whole lasted a matter of 10 or 15 minutes?

A. The conversation with Edgar lasted about 10 or 15 minutes, but the conversation with the other group of the family amounted to more than that.

Q. To what other members of the family did you speak?

A. Well, I spoke to Reinhold's wife and Reinhold. They were very much interested in my investigation because the price of wool was down to 4 and 4½ cents a pound. The wool growers were complaining about the price.

Q. You don't claim that you discussed ranch conditions with them?[220]

A. I didn't discuss the ranch conditions with Reinhold or his wife.

Q. With nobody except Edgar on that trip?

A. I had 10 or 15 minutes' conversation with Edgar.

(Testimony of Mr. Clarence Sadler.)

Q. That related to the ranch and mining claims?

A. I don't know whether I discussed the mining claims with Edgar alone or with Edgar in combination with the group.

Q. On that occasion? A. That is correct.

Q. May the discussion about the ranch have been in combination with Edgar with other members of the group?

A. As I said before, I discussed the condition of the ranch with Edgar.

Q. The other members of the family there were not present? Were they within hearing?

A. I don't recall whether they were within hearing or not.

Q. In 1925, that is when you spent, I think you said, two or three days out there, is that right?

A. In 1925 my wife and I spent two or three days, maybe longer, maybe four days.

Q. Where were you headed for on that occasion?

A. For Salt Lake, Baker, Oregon, Portland and Seattle.

Q. On your same professional business?

Q. I was on a government assignment, yes sir.

Q. Did you stop off at any place on the [221] road? I mean between here and Ely, beside Eureka, on that occasion?

A. We didn't go to Ely on that occasion, Mr. Cooke. We went to Eureka, went to Palisade by train and from Palisade to Eureka by train and had to stop over in Imlay one night until Reinhold came up with the stage next morning and picked us up and took us down to the ranch, and we stayed there

(Testimony of Mr. Clarence Sadler.)

three or four days and then he took us out to Railroad Canyon pass and dumped us, as I would say, and we had to wait there two hours afterwards for the train, the motor coach, to come in from Eureka to go to Palisade, took the train at Palisade and then went to Ogden and then went into Salt Lake.

Q. You said something about a stage. Was he operating a stage?

A. As I recall it, they were carrying Mail and vegetables. Carried mail for the United States government from the ranch to Eureka.

Q. Where is Railroad Canyon?

A. Where you pick up the train coming from Eureka to Palisade.

Q. And that is where he left you and your wife off?

A. That is correct.

Q. Was that a convenient or proper place to leave you off?

Mr. Thompson: Objected to as immaterial.

Mr. Cooke: He used the word "dumped."

A. Well, I would say, Mr. Cooke, there is nothing there but the railroad tracks. [222]

Q. What other place could he have taken you to?

Mr. Thompson: Objected to as argumentative and also calls for the conclusion of the witness.

The Court: Overruled. You may answer the question.

A. That is the closest point to Eureka to catch the train.

Q. Was that the usual point that they used for that purpose?

(Testimony of Mr. Clarence Sadler.)

A. Well, I don't know. I had never taken the train at that point before. I always went into Eureka or Palisade.

Q. When you say he dumped you, do you mean by that he should have taken you to some other place?

A. No, what I meant there he just left us there by ourselves and we had to sit on the suitcases for two hours waiting for the train to come along.

Q. Where did the conversation take place with reference to the rooms in the Sadler house that you told about in 1925?

A. As I recall it, it took place in front of the kitchen and bedroom off the porch.

Q. How many rooms in that house?

A. Well, kitchen and living room and one bedroom on one side and I believe two bedrooms on the other side.

Q. Is that house standing there now?

A. It was the last time I was there.

Q. That was in 1938?

A. What conversation are you talking about, 1925 or 1938?

Q. I am talking about 1925. [223]

A. The house used to be an old bunk house and was converted into a house because the old house burned down on Decoration Day 1923. The farm house burned down, regular wooden structure.

Q. All right, going back to this house and this conversation, tell us who was present at the time you had conversation with Edgar Sadler on that occasion.

(Testimony of Mr. Clarence Sadler.)

A. Well, I believe Ethel, Edgar and my wife and I were present.

Q. Were they all participating in the conversation or you and Edgar doing the talking?

A. No, I think they all participated. I think most of the questions were directed to Edgar.

Q. How much of that conversation had to do with the ranch and ranch conditions?

A. Oh, I would say maybe three-fourths of it. The cloudburst came so it was discontinued.

Q. It was not resumed at all during your trip out there?

A. Well, there wasn't much discussion after that.

Q. And you say it took up about three-quarters of an hour? A. I would say so, yes.

Q. Was that whole three-quarters of an hour devoted to discussion pro and con ranch conditions?

A. Well, other subjects possibly were injected into the discussion, but the main discussions were as to condition of the [224] ranch and marketability of the property.

Q. There was just a conversation started about the ranch and what was said by Edgar and what was said by you, repeat it if you can.

A. Well, I asked Edgar about disposing of the ranch and as I recall it he said market conditions were such that if he put the ranch on the market at that time a reasonable price could not be obtained.

(Testimony of Mr. Clarence Sadler.)

Q. Do you remember anything more of the conversation with reference to that?

A. Yes, he was talking about the stock and——

Q. You mean livestock or shares?

A. Livestock, condition of the meadow, mentioned the fact that some of the barns were in need of repair and also that the winter sheds were in bad condition and the meadows, some of the land he was reseeding, and also that the people across the way, that is across the valley, had placed their ranch on the market.

Q. Is that the substance of all you can recall of that conversation?

A. That is the substance and then, as I said before, the cloudburst came and we had to drop everything and try to divert water from going through the house. As a matter of fact, a great part of it went through the kitchen.

Q. What was said by any of the other members of the party outside of you and Edgar on that occasion? Do you remember [225] that?

A. Anything about the ranch?

Q. Yes.

A. I didn't discuss the ranch with anybody except in that particular group.

Q. No, but they were present, I understood?

A. My wife also asked some questions of Edgar about disposition of the ranch.

Q. Do you remember what questions they were?

A. Well, she asked him along the same lines I did, when he could dispose of the ranch.

(Testimony of Mr. Clarence Sadler.)

Q. Did the other members have anything to say in regard to that subject?

A. Possibly Ethel said something.

Q. You don't recall?

A. Well, she may have said, "It is a poor time to sell the ranch now," as I recall.

Q. You remember her saying that?

A. Yes.

Q. And who were the other members present there?

A. Edgar, Ethel, my wife and myself.

Q. Just the four of you?

A. That is correct.

Q. Now the next visit, if I have it correct, was in 1938?

A. That is correct. [226]

Q. That is the next one and the last one?

A. That is correct.

Q. And on that occasion how did you come to make this visit?

A. Well, I left San Francisco with Mr. George Casto by car, for the purpose of going deer hunting, and we stopped at Winnemucca the first night and then the next day proceeded on to my nephew's ranch, Edgar Lane Plummer, and we stayed there that night and the following day went deer hunting. We stayed that night and next morning went over to the Diamond Ranch.

Q. What time in October, as near as you can fix the date, was that?

A. After the deer season was open in Eureka County.

(Testimony of Mr. Clarence Sadler.)

Q. There is no way of fixing the date any more definite to that time than that?

A. I don't know. I think the deer season opened October 15th, I am not positive.

Q. Are you sure it was during the month of October that you were there?

A. As I recall it, yes.

Q. What did this associate or friend of yours do while you were talking with Mr. Sadler?

A. My friend, Mr. Casto, was with Floyd Sadler hunting ducks down in the meadow.

Q. This conversation in 1938, about how long did that take?

A. Oh, I don't think that conversation was more than 15 or 20 [227] minutes. It was while they were in the fields hunting duck because I didn't broach the subject until Mr. Casto was absent from the ranch house.

Q. About 15 or 20 minutes you think the conversation took that you had with Edgar Sadler on that occasion?

A. Yes.

Q. And was anybody else present beside you and he participating in the conversation?

A. No, I don't believe any one else was present.

Q. Where did the conversation take place, what part of the house?

A. The conversation took place in front of the living room and the kitchen, between the two places, on the porch.

(Testimony of Mr. Clarence Sadler.)

Q. Did you see any other members of the family passing through or around or near that room while you were talking?

A. Well, they were in the house, but I don't recall whether they passed in front of us or not.

Q. You are quite sure they were not in the room and didn't participate?

A. We didn't have the conversation in the room, Mr. Cooke, we had it out on the front porch.

Q. Well, you are quite sure none of them participated in the conversation, wherever it was held?

A. That is correct.

Q. Was that in the day time or night time?

A. Well, I would say in the afternoon, late afternoon, because we were duck hunting that morning and at noon came in and Mr. Casto and Floyd Sadler went down to the other part of the field to get some ducks. I think it was late in the afternoon.

Q. Go on and tell us just how the matter of the ranch subject came up for discussion between you and Edgar. What was said first and who said it?

A. Well, I asked Edgar what disposition could be made of the ranch, if it could be sold, and he said, well, it would be a poor time to put the ranch on the market at that time. It wouldn't bring a reasonable price. He pointed out that other farmers had lost considerable cattle or been paid a low price by the government on account of disease, as I recall it. He said some of them received only \$20

(Testimony of Mr. Clarence Sadler.)

per head. He also mentioned he had to dispose of some of his cattle and received only \$20 from the government for each head disposed of.

Q. Was any amount discussed for which the ranch might or might not be sold?

A. Not in the year 1938.

Q. Now you have now stated the substance of the conversation you had on that occasion?

A. Yes, I think so, because Mr. Casto and Floyd returned. They weren't gone very long, possibly an hour or maybe a little over an hour. [229]

Q. You and Mr. Casto then proceeded——

A. Stayed there that night and then went into Eureka the following morning and returned to Berkeley.

Q. The matter of the ranch or sale of it didn't come up again though for further discussion that evening, did it? A. I don't recall.

Q. The following morning you left for Berkeley?

A. Yes, and before we left Edgar asked me if I wanted to take a sack of potatoes. I said no because the California restrictions prohibited me from taking them in from Nevada.

Q. Was the subject of the expense of operating the ranch mentioned by either you or Edgar Sadler on the occasion of the talk in 1938?

A. Possibly was.

Q. Do you remember anything about it, how it was discussed?

A. Well, on various occasions Edgar said that the expenses were high and that it was necessary

(Testimony of Mr. Clarence Sadler.)

to sell cattle in order to pay the farm help and he indicated that due to the disease and the payment by the government of only \$20, it was hard to raise money.

Q. Did you on that occasion, or on any occasion, volunteer to help out?

A. I was never requested to.

Q. You knew, however, that he was at times very hard pressed for money to keep the ranch going, didn't you? [230]

A. So I understand, yes.

Q. You understood at that time, didn't you?

A. I don't know whether he made any claim for any money at that time or not. As I recall it, he never made a claim upon me for money.

Q. I am asking you if you didn't know he was struggling to get money, mortgaged the property over and over again repeatedly to keep the place going?

A. Well, he never told me of any mortgages outside the land mortgages.

Q. I am asking if you didn't know, irrespective of what he told you, from any source?

A. Yes, I know he only made two loans from the Berkeley Land Bank, one was earlier and the other came later.

Q. That is earlier than what date, for instance?

A. Well, I have a copy of the loan agreement and I can establish the date from that.

Q. Were those the only two loans that you just told us about that you knew of his negotiating to keep things going out there?

(Testimony of Mr. Clarence Sadler.)

A. I knew of the loan from the Washoe County Bank and from the Eureka and Winnemucca banks and the Land Banks.

Q. Those were in addition to the land banks?

A. That is correct. The first loan, as I recall it, was made by the Washoe County Bank at the time the decree was signed and the ranch was put up as collateral for the loan. This [231] loan was personally made by Judge Cheney. Judge Cheney personally arranged the loan because Judge Cheney told me so.

Q. Is that all you know, about what Judge Cheney told you? A. No, Alfred told me.

Q. Did Edgar ever tell you about it?

A. I didn't see Edgar until my mother died.

Q. Anyway, the loan was obtained and mortgage made to the Washoe County Bank?

A. That is correct.

Q. That is the first one?

A. That is the first one.

Q. And then you told us, as I understand it, of two more made later on through the banks and then the two land bank mortgages.

A. Later on they borrowed money from a bank in Winnemucca, as I recall, and Eureka County Bank, in order to pay off the loan to the Washoe County Bank. He had two loans, as I recall it, or two banks took the loan on the ranch.

Q. When did you learn of this, Mr. Sadler, with reference to the time they were negotiated?

(Testimony of Mr. Clarence Sadler.)

A. Alfred reported those facts to me. I don't know whether he reported them verbally or by letter.

Q. Then am I right in assuming that it is your testimony that there were five loans altogether that you knew of, secured by mortgages? [232]

A. No, there was the first loan to the Washoe County Bank and the next one, I think, was a consolidated loan in Winnemucca and Eureka Bank to take up the mortgage from the Washoe County Bank, and subsequently there was a loan from the Berkeley Farm Bank and later there was another loan from the Berkeley Farm Bank, which was paid off within a year or year and a half's time because I went through the records of the Farm Bank in Berkeley and I got the appraisal value of the ranch and all the other detail.

Q. When did you go through the records of the Berkeley bank regarding this loan?

A. Well, some time in the thirties, I would say.

Q. About what time? Was it about the date of it or shortly after?

A. No, several years after.

Q. Was that all the mortgages you have heard anything about that you told us now?

A. I learned of the chattel mortgage on the cattle that was placed with this subsidiary of the Bank of America.

Q. And about when did you learn of that?

A. Oh, I learned of that, oh within—'44, I would say.

(Testimony of Mr. Clarence Sadler.)

Q. How did you learn about it?

A. Because I went to the bank and asked if there was a loan on the cattle at the ranch.

Q. I wanted to know whether Alfred reported it or—— [233]

A. I got it from the bank directly. I think Alfred mentioned it too before that, that there was a loan down there.

Q. Those are all of the mortgages, either real or chattel, that you recall?

A. No, I recall another one now that was placed on the cattle. I don't know whether it was a loan—it was a loan, but I don't know whether it was secured by a mortgage or not. That was to Thomas Dixon.

Q. Do you remember the amount of it?

A. No sir, I do not.

Q. Do you remember about when that so-called Thomas Dixon loan took place, when you learned of it?

A. No. I don't recall the time of the year, sir, but it was in some records that I had and my mother's letters, showing the payment of this loan to Tom Dixon on cattle purchased either by Edgar or the ranch. Now I don't recall the exact details.

Q. You testified a moment ago that on the occasion of one of your trips out there, there were some employees there, is that correct?

A. He always has employees on the ranch, yes sir.

(Testimony of Mr. Clarence Sadler.)

Q. In addition to his own sons he has to hire men?

A. In the haying season he has maybe 8 or 10.

Q. How about other seasons? For instance, when you were out there hunting ducks after haying closed, were there men [234] working there?

A. There were.

Q. How many?

A. I think two, I think. One was leaving; as a matter of fact, one left with us. I don't know whether he was on the payroll or not at the time.

Q. How many were there then that you saw that you assume they were hired?

A. Two as I recall. One left with us in the car. We took him to Oakland.

Q. On other occasions, 1925 and 1933 or 1938, on the occasion of other trips, did you see any hired men working there?

A. In 1925 the haying season was on and a good many men there. Some of them accompanied us on the hunting trip in the meadows.

Q. When you say a "good many," tell us how many?

A. Possibly six or eight.

Q. Then on the other occasions of these three trips no hired men were there then?

A. On the other occasion I didn't stay long enough to see how many men were there.

Q. You were there about 10 or 15 minutes?

A. I was there longer than that because I drove in from Reno to the ranch and left and went to Ely that night.

(Testimony of Mr. Clarence Sadler.)

Q. You don't recall? [235]

A. I don't recall seeing any man that night. That was during the fall, possibly they were down in the meadow.

Q. Was that trip made in 1933 or 1938?

A. That trip was made in 1933. I was out there on a wool investigation.

Q. Did you have any information, at the time you were making these visits, as to the approximate value, probable value, or estimated value the ranch was worth?

A. Well, I went over the records of the Federal Farm Bank, went over the appraisal records and they had the property valued at 41 thousand some odd dollars.

Q. This 3120 acres of land, the Diamond Valley Ranch?

A. That is correct, and they made a loan on that basis.

Q. When was it that you got that data or information as to the value of that ranch?

A. It was in the late thirties, I would say.

Q. And where was it gathered?

A. At the Berkeley Farm Bank in Berkeley.

Q. Was there a mortgage on the property at that time, do you know?

A. There was. There was one on and the other had been paid.

Q. As a matter of fact, there has been a mortgage, not the same mortgage, but the property has been under mortgage continuously since 1918, hasn't it?

(Testimony of Mr. Clarence Sadler.)

A. Yes, it is still under mortgage. [236]

Q. Do you know the amount of the mortgage upon it?

A. Well, the last figure I received, I think around 11 thousand dollars or approximately.

Q. From what source did you obtain that?

A. I obtained that from Alfred and also I think the bank after Alfred died. It will show on the loan note just how much was paid at that time.

Q. Yes, I understand. I am trying to find out what you know about it.

A. We have a photostatic copy of it.

Q. As I understand from your direct examination, Mr. Sadler, the first time that Edgar disputed or denied that you had an interest in the ranch was on the occasion of Alfred's funeral?

A. It was the night before Alfred's funeral.

Q. On that visit here in Reno?

A. That is correct.

Q. Is it true that up to that time you had full confidence in him going right ahead there and taking care of things and looking after it and relieving you of any duty, worrying about it at all?

Mr. Thompson: This is a compound question, your Honor.

(Question read.)

The Court: Answer the question.

A. The relationship between Edgar, Alfred and myself have [237] always been amiable and we always tried to eliminate any friction between brothers.

Q. Well, you say the relationship between you

(Testimony of Mr. Clarence Sadler.)

and Edgar in that regard was the same as between you and Alfred?

A. Well, I will tell you, Alfred was my attorney in fact and I looked to Alfred for information, but Edgar, his wife, and the children came to the house and we visited with them and it was always an amiable disposition.

Q. So nothing occurred to disturb your confidence that Edgar was taking care of the ranch and that it was not necessary for you to take any more interest in the matter than you did?

A. Well, Edgar had been on the ranch for years and I presumed he knew the conditions out there and he would carry on the office and manage the ranch as he was supposed to do under the trust agreement and sell it in compliance with the terms of the trust agreement.

Q. What trust agreement do you refer to?

A. The trust agreement entered into March 2, 1918.

Q. That is Exhibit 8.?

A. That is Exhibit 8 in the record, yes sir.

Q. Do you mean that that trust agreement imposed any duty upon Edgar to operate the ranch?

A. It imposed duty on him to dispose of the ranch by a reasonable time, as I read the trust agreement and as my mother and Bertha and Alfred reported to me. [238]

Q. I am not asking that, Mr. Sadler.

Mr. Cook: I move that last portion be stricken out.

(Question read.)

(Testimony of Mr. Clarence Sadler.)

The Court: The answer may stand.

Q. Mr. Sadler, I hand you Exhibit 8, which is what you call the trust agreement, is that it?

A. Yes sir.

Q. Will you point out what portion of that document you have reference to or you rely upon as proving any duty upon Edgar Sadler to operate the ranch?

Mr. Thompson: Objected to, the agreement speaks for itself, your Honor.

Mr. Cooke: It does not speak for what this witness says.

The Court: I think on cross-examination he is entitled to ask this question. Objection overruled.

A. Edgar and Alfred took legal title to the ranch and held it in trust for the heirs of Reinhold Sadler——

Q. I am not asking you that at all.

A. And inasmuch as Edgar had been on the ranch and managed the ranch for a number of years, he should give it the proper care and consideration in order to protect the beneficiaries in this trust. [239]

Mr Cooke: I move the answer be stricken as not responsive, your Honor.

The Court: I think that is the case here. The question was directing your attention to the exhibit and asked if certain matters were in that exhibit. Read the question again.

(Question read.)

The Court: The answer goes out.

(Testimony of Mr. Clarence Sadler.)

A. There is nothing in the trust agreement providing for management of the ranch.

Q. You saw this document that you have denominated trust agreement, which is marked Plaintiff's Exhibit 8, very shortly after the date it bears, March 2, 1918?

A. That is right, May or June of 1918.

Q. It is dated March 2nd?

A. That's right.

Q. And you saw it at Carson City?

A. I saw it three times at Carson City.

Q. What was the occasion of your seeing it?
How did you come to see it?

A. How did I come to see it?

Q. Yes.

A. Because my mother and Alfred wrote to me that such a trust agreement had been signed. [240]

Q. Have you evidence?

A. No sir. That is one of the letters that was destroyed. Bertha also wrote to me.

Q. Was that letter destroyed too?

A. Yes.

Q. Well, anyway they wrote to you about there being such a document signed and then after that you were in Carson City?

A. I was in Carson City in May or June of 1918 and I looked at the trust agreement myself. I got it out of my mother's tin box, and I was there again in 1920 and I looked for the trust agreement and found it. After my mother's death it was in the box and I told Alfred to take it to Reno for safe keeping.

(Testimony of Mr. Clarence Sadler.)

Q. Well, I didn't ask you about that, Mr. Sadler. Now in 1918 in May or June, when you saw it in Carson City, what was the occasion of your visit to Carson City at that time?

A. I visited home before I went into the army in San Francisco. I was discharged from the aviation section in Louisiana.

Q. You were in the service prior to that, were you not? A. That is correct.

Q. And you told us on your direct examination you were ordered overseas?

A. That is correct.

Q. Did you go overseas?

A. No, sir, the Armistice was signed. [241]

Q. On the 11th of November?

A. November 11, 1918, yes sir.

Q. Coming back to your visit in Carson City, who else of the children of Reinhold Sadler were there on that occasion?

A. Bertha and my mother.

Q. How much time did you spend in Carson City that time? A. Oh, possibly a week.

Q. Were you there on a visit?

A. Yes, I was. I was inducted into service at that time by the Carson board.

Q. The matter of this March 2, 1918 document that you call a trust agreement, that didn't have anything to do with your making a visit there at that time, did it?

A. I wanted to see my folks before I went in service and I stopped over and was interested in looking at the trust agreement.

(Testimony of Mr. Clarence Sadler.)

Q. You knew about the trust agreement before?

A. That is correct. My mother, Bertha and Alfred reported they signed the agreement.

Q. That was one of the things you wanted to see about when you got there?

A. Yes, I asked about it, yes.

Q. You considered it of considerable importance, didn't you?

A. Well, my inheritance was involved.

Q. Answer the question, Mr. Sadler, you considered it of importance [242] to you, didn't you?

A. Certainly I did.

Q. Did you take a copy of it? A. No sir.

(Short recess taken at 3:30 p.m.)

CLARENCE SADLER

resumed the witness stand on further cross-examination by Mr. Cooke.

Q. When did you first go into the armed services of World War I?

A. I enlisted some time in 1917 at Ft. Meyers. I was called later to my qualified school at Princeton, New Jersey, and I stayed there until I finished the course and went to Field 2 outside Hempstedt, awaiting embarkation for overseas.

Q. This was 1917, was it? A. Yes sir.

Q. What time in 1917?

A. Well, I enlisted some time in May or June of 1917, as I recall it.

Q. What was the service?

(Testimony of Clarence Sadler.)

A. That was the aviation section of the signal corps.

Q. You continued in that service how long?

A. I continued in that service until May or June of 1918.

Q. You were stationed at various places outside of Nevada from that time continuously down to when?

A. I was stationed at Hempsted Field until I got my discharge [243] in May or June and I returned to Nevada. I first returned to Washington and then came on to Nevada and spent some time home and in San Francisco and was inducted into the Coast Artillery.

Q. In what year? A. That was in 1918.

Q. And you continued on until the Armistice was signed?

A. I was discharged at Camp Rockford December 10, 1918, and I returned to Washington.

Q. When you came to Carson City in May or June of 1918 was there any connection between that visit and your military service?

A. I had been discharged from the aviation section and I reported to my draft board in Carson City.

Q. Did you have to come to Carson City for that purpose?

A. I presume I did because they called me to report to Ft. Lewis and I was already in the service at the time I received my announcement to report to Ft. Lewis.

(Testimony of Clarence Sadler.)

Q. Is it correct to say that that was your sole business in coming to Carson City on that occasion?

A. I wanted to visit my family. I wanted to see this agreement that my mother and Alfred and Bertha had told me about.

Q. Anyway, you had two purposes then, one was to see this document and the other to see to the military matter and the draft board? [244]

A. That is correct.

Q. How soon after you got to Carson City on this occasion was it that you saw this paper marked Plaintiff's Exhibit 8?

A. Possibly the next day.

Q. And how was it delivered to you?

A. It wasn't delivered. I went into my mother's tin box and opened it myself.

Q. Did you go there for any other papers besides this one?

A. Did I go there for any other papers?

Q. Yes.

A. All the ranch papers were in that box, part of them anyway.

Q. You just assumed when you started for this tin box that this document would be in it?

A. That is where my mother kept her papers.

Q. I think I asked you a moment ago whether you made a copy of this?

A. No, I made no copy.

Q. A photostat was made of it at one time, was it not?

A. It was.

(Testimony of Clarence Sadler.)

Q. Did you have anything to do with securing that photostat?

A. I had the photostat made, yes sir, after my brother's death.

Q. And that was for such use as principal in connection with the litigation?

A. I made photostats—yes.

Q. After you read this document, the matter of adding anything [245] to it or changing it in any way didn't come up between you and Edgar?

A. No sir.

Q. Did it occur to you that any correction or addition or change was necessary?

A. It would be necessary to obtain the consent of all parties, I knew that from my law experience, so I left it as is.

Q. You claimed at that time, as heir of Reinhold Sadler, Sr., that you had a substantial interest in that property?

A. I still claim so.

Q. But at that time you had that idea?

A. That's correct.

Mr. Thompson: May I ask what time you are talking about?

Mr. Cooke: At the time he was there in May or June of 1918, when he first saw these papers.

Q. I don't want to pry into your personal affairs, but is it a fact that your expectancy as an heir was your principal property asset at that time?

A. No, my father had interests in mines, had interests in this ranch and he had other interests.

(Testimony of Clarence Sadler.)

Q. I know, but shown by the inventory as between the mining claims and your expectancy in the ranch, which in your mind was the most valuable?

A. Well, I thought the ranch was most valuable because Eureka [246] mines were at that time not marketable for any considerable sum.

Q. And aside from your expectancy in the ranch and the other properties that your father had, that constituted substantially all the property you had?

A. That is correct.

Q. In any of the conversations that you had with Edgar Sadler subsequent to March 2, 1918, did you ever mention to him or he to you the existence of this paper, Exhibit 8? A. No.

Q. I think you told us that you caused this ranch to be listed with one or more selling agencies?

A. I did.

Q. What year was that, Mr. Sadler, do you remember?

A. Well, I think after I returned from my trip to the northwest; possibly it was in the late part of 1925 or early part of 1926 I listed it with a firm in San Francisco and then again in 1931 I listed it with two other firms in San Francisco and possibly in Los Angeles and then I believe it was later on I listed it with other firms in Los Angeles.

Q. You mentioned in your direct testimony that you listed it with a firm mentioned by the name of Banker & Caldwell?

A. Caldwell Banker & Caldwell. They are on Sutter street. I had a friend there that was in that firm.

(Testimony of Clarence Sadler.)

Q. When was that listing made in that particular firm? [247]

A. I think that listing was made in 1931.

Q. And do you remember what price the ranch was listed at?

A. I think that year it was listed at 65 thousand.

Q. That, of course, didn't include anything except just the ranch property, the real estate?

A. That's all.

Q. And was it listed at the same price at these other places as you remember?

A. As I recall it was listed at 65 thousand, yes, that is the price Edgar and Alfred agreed on.

Q. You mentioned in your direct examination that you had listed it with some firm in Los Angeles.

A. I have.

Q. Do you remember the name of the firm?

A. I remember the man's name, Owen. His firm was located in a building on 4th & Main Street. He listed Las Vegas properties and also specialized in ranches.

Q. Do you remember the initials?

A. No, I don't recall his initials and I don't recall the name of the real estate firm. It was on 4th & Main.

Q. He was simply a member or agent of the firm?

A. Well, he was handling the Las Vegas properties and also ranch properties.

Q. Did you know him personally?

A. In a way, yes, but through my calls on him in connection [248] Las Vegas properties.

(Testimony of Clarence Sadler.)

Q. When was that listing made, in what year?

A. As I recall, it was in 1931.

Q. All of the listings were for the same figure, 65 thousand?

A. No, the first listings, as I recall it, were for 75 thousand.

Q. And they dropped down to 65 thousand?

A. Yes. The first listing was made in the winter of 1925 or the spring of 1926 when I returned to San Francisco.

Q. I think you told us previously that the property was appraised by some of these concerns loaning money at 40 or 41 thousand, is that right?

A. I made the statement that the property was appraised by the Berkeley Land Bank at 41 thousand and some odd hundred dollars.

Q. When was that supposed to have been made?

A. That appraisal was made at the time the loan was made.

Q. Well, when was that?

A. I have a copy of the loan.

Q. Have you a copy of it? You may look at that to refresh your recollection. Your attorney has handed me a document that he has marked exhibit "K" and it is a photostat of a deed of trust dated May 1, 1928 from Edgar Sadler and wife and Alfred Sadler and wife to themselves as trustee, is that the document?

A. Yes, that is the loan agreement.

Q. And appraisal was made in connection with that?

(Testimony of Clarence Sadler.)

A. The appraisal was made prior to the authorization of the loan.

Q. But it would be a fact that the date was shortly before?

A. I presume it would.

Q. Did that represent, according to your judgment, a fair value of the property at that time?

A. No, I thought probably it was worth more.

Q. Do you have any knowledge as to what the property was worth, we will say, in March, 1918?

A. March, 1918, well, I hadn't been on the ranch since 1912 and as I understand it from Mr. Castle later, Edgar was offered 40 thousand for the ranch in 1918.

Q. That is all that you know as to its value at that time, is that right?

A. I am not an appraiser of ranch lands, so I can't fix the valuation, Mr. Cooke.

Q. You didn't have any idea in your own mind, without being an official appraiser, as to what it was worth at that time?

A. Well, I considered the spring on the ranch to be worth in excess of 40 thousand dollars, because in that section there is very little water and water in Nevada means very good land.

Q. What is the name of that spring?

A. It is the Shipley Spring.

Q. It is worth 30 thousand dollars itself? [250]

A. I estimated it would be worth more than that. If that spring was in California it would be worth several times that.

(Testimony of Clarence Sadler.)

Q. What I am trying to get at, Mr. Sadler, is what your judgment was as to the value of the ranch, just in your own mind, at the time when this agreement, Exhibit 8, was made in March, 1918, if you had any?

A. Well, I hadn't been on the ranch since 1912 to 1925.

Q. You saw that document the following May or June?

A. In May or June of 1918.

Q. And you remember the language in the document that the ranch was to be sold at the first good offer at an advantageous figure?

A. Yes.

Q. Did you have in your own mind at that time what an advantageous figure would be?

A. No.

Q. Did you have in mind at that time a figure that you would be willing to sell for, as far as you were interested in it?

A. Well, my brother Edgar and Alfred were living in Nevada and knew the value of ranch properties and I would be guided much on their judgment.

Q. But what I am getting at, Mr. Sadler, if you had any independent, idea, your own idea, what your claimed interest in that property amounted to?

Mr. Thompson: He already answered he didn't have any [251] definite idea what the property was worth.

The Court: Let us have the answer again.

A. You mean my own claim?

(Testimony of Clarence Sadler.)

Q. Yes, or the total value of the property?

A. Well, I figured I was one of the heirs of Heinhold Sadler and I should come in for my share of the property.

Q. I am trying to find out if you had any idea of your own, expressed in dollars and cents, what it was worth?

A. Well, I estimated the ranch was worth at least 50 or 60 thousand dollars at that time.

Q. That is what I was trying to get at. What do you estimate it is worth now?

A. I don't know, but from the general condition of the market it might be worth three or four times that much. That is largely based on hearsay.

Q. I understand you don't hold yourself out as being an expert on the value of ranches?

A. That is correct.

Q. But it is your very firm belief that it is worth a good deal more now than when you saw that document in May or June of 1918?

A. Under present market conditions, I would say yes.

Q. Did you take note of the manner in which the ranch was operated and taken care of when you were out there first in 1925, after this document was made.

A. I did.

Q. What did you observe in regard to the way it seemed to be taken care of, properly or not?

A. Well, I observed it was being conducted in an orderly manner. I noticed some of the fields were not, especially the alfalfa fields, were not producing

(Testimony of Clarence Sadler.)

as much alfalfa as formerly and that some of the area down in the meadow were somewhat dried out.

Q. From lack of water?

A. Just dried out. I don't know whether it was a dry year or not. While we were there it rained some, but I don't know whether the spring was dry.

Q. How about the house and fence and equipment and machinery around there, did that seem to be kept up in good condition or not?

A. Appeared at least to be so.

Q. You found nothing to criticize, did you?

A. When we went out there in 1925 the farm house was destroyed and they were remodelling the old bunk house and made it into a family ranch house. That is the house that is there now.

Q. How did that house compare with the other one, as to being comfortable or otherwise?

A. Well, he made it into a comfortable house, the bunk house. The walls are about two or three feet thick and in summer time it is cool and in the wintertime it is warm. [253]

Q. And did you notice any of the livestock around there?

A. I did. I went down to the meadow, a few in there but most of them out on the range.

Q. How about the barns and dams and machinery and equipment?

A. I didn't get a chance to examine the machinery, but the barns seemed to be in good condition.

Q. I take it that your notice was more or less casual?

A. That is correct.

(Testimony of Clarence Sadler.)

Q. Now in 1931 was the next trip?

A. 1933.

Q. Did you on that occasion take note of the condition of the farm machinery and equipment and the fields and meadows and like that?

A. I wasn't there long enough.

Q. That was when you were there that 15 minutes?

A. No, I was there longer than that.

Q. That is when you had this 15-minute talk? Whatever the reason was, you didn't take any note of conditions at that time?

A. No, I didn't have the time.

Q. And when you were there in 1938 that is when you were there on the hunting trip?

A. That is correct.

Q. You were there for some two or three days that time, I mean there and in that neighborhood?

A. I think we were at the ranch two days; two days, yes; we [254] left on the third morning.

Q. What did you see about the ranch at that time in regard to the manner in which it was kept up?

A. It seemed to be in good repair.

Q. Good condition, signs of work there and somebody taking care of it? A. Yes.

Q. And what do you refer to, the meadows or the natural grass land or the seeded grass land, or what?

A. The only place I examined, had a chance to see at that time, was what we call the Taft field

(Testimony of Clarence Sadler.)

and the land known as a part of the Romana Ranch. The contract was taken out in the name of Mr. Taft.

Q. And you noted those two acreages, did you?

A. Yes, those two. I didn't go down in the other section.

Q. How about the fences, what were the conditions of the fences? Were they kept up?

A. We only went through one part of the meadow into the other through the Taft field and we didn't see all the fences, but I remarked to Mr. Casto that we used those cattle sheds for a while that are along the board fence to keep the cattle in there during the winter time and I said, "Well, those sheds seem to be gone down, fallen down."

Q. They were in disrepair?

A. Well, I think they just caved in and they picked up the [255] lumber possibly and used it for some other purpose.

Q. So the sheds at that time——

A. (Interrupting): These were sheds for winter time, where they fed the cattle.

Q. The sheds at that time, along in October, 1938, were not in a condition to be used?

A. Well, I don't believe there were any sheds there. When I was out there in my early days, these sheds were there and they used them to feed the cattle in the winter time. In other words, it was a storm brake.

Q. You said something about being caved in.

A. They had been removed. Part of them had

(Testimony of Clarence Sadler.)

caved in or fallen in and they just used the lumber for other purposes.

Q. The fact is that the sheds formerly there were entirely removed?

A. They were not sheds, they were cattle brakes, wind brakes.

Q. Whatever they were, they were no longer there?

A. I didn't notice them when we drove in from my nephew's ranch.

Q. That was the only change that you saw in regard to difference in number of buildings, sheds, etc. on the ranch at that time?

A. I think one of the old sheds that housed the wagons was gone.

Q. Did you notice any new buildings of any kind?

A. Yes, I noticed a new house.

Q. That was the one you already told us about?

A. No, another new house.

Q. What kind of new house was that?

A. A dwelling for Reinhold Sadler.

Q. That is close by the old homestead there?

A. That is **correct**.

Q. That was built there between your second and last visit that you made, is that right?

A. As I recall, it was build between 1933 and 1938. I might be mistaken.

Q. Did you notice any other improvements, new improvements I mean, in 1938 as compared with the condition that you found there in 1933?

Mr. Thompson: He said he didn't examine the conditions in 1933, Mr. Cooke.

(Testimony of Clarence Sadler.)

A. I don't recall any, Mr. Cooke.

Q. Outside of that one?

A. The homestead.

Q. That new house?

A. Yes, Reinhold's home.

Q. Now you did not make any comment or recommendations or criticisms to Edgar about anything in regard to the property not being taken care of?

A. Well, I think Edgar, in one of the conversations, told me [257] that certain acreages needed reseeded and I have a recollection that part of the money that was obtained from the Federal Farm Bank was to be used for that purpose.

Q. That was his suggestion, but what I am getting at, Mr. Sadler, if you found anything to criticise and if you did criticise?

A. I don't believe I criticised the up-keep of the ranch.

Q. In other words, it was satisfactory to you?

A. As to the up-keep of the ranch?

Q. Yes. A. Yes sir.

Q. Was there anything about it that was not satisfactory outside of the up-keep or set-up?

A. No, I wouldn't say so.

Q. In your complaint in this case I think you allege that the value of the property at the time the action was commenced was 100 thousand dollars or upwards, is that right? A. Yes sir.

Q. Does that include or exclude the personal property, the livestock or is it intended just to apply to the ranch?

(Testimony of Clarence Sadler.)

A. Well, I think under the present market values the ranch is worth more than 100 thousand dollars.

Q. The ranch itself?

A. That is the ranch itself, and you can't put any market on the cattle today because they are going higher, not since they removed the OPA regulations. [258]

Q. So it is fair to say that 100 thousand dollar valuation you had there had to do with the ranch?

A. May I see the complaint sir?

Q. Yes sir.

A. It is alleged in the complaint that the value of the livestock and the ranch equipment is in excess of 100 thousand dollars.

Q. Do you think that is a correct figure, or was a correct figure at that time?

A. Well, I say the complaint reads "in excess of ten thousand dollars."

Q. You can go as high as you want to?

A. Yes.

Q. How much in excess of 100 thousand dollars would you say it is worth now?

A. I don't know.

Q. You have not any certain amount at all?

A. No sir.

Q. Now, Mr. Sadler, you have testified to a large number of letters that you received from Alfred and which have been marked as exhibits in this case. Do the letters that you have introduced here and which are marked as exhibits comprise all the letters that you received from him? A. No.

(Testimony of Clarence Sadler.)

Q. I mean in reference to the ranch?

A. I think it does, yes.

Q. Is it correct to say then that so far as you are concerned you know of no other letter that you got from him where he mentioned the ranch conditions?

A. Well, I destroyed a lot of letters, Mr. Cooke. The letters I destroyed do not include letters here as exhibits.

Q. I am sure I understand that. Do you mean they were destroyed at the time you——

A. (Interrupting): When I went into the service.

Q. Did you voluntarily destroy them?

A. I did, sir.

Q. Did you destroy anything else besides those particular letters?

A. Yes, I destroyed correspondence I had with friends of mine. I also destroyed other documents in relation to my affairs.

Q. You were making sort of a clean-up of non-essential matters?

A. I had to because the restrictions during that time required us to keep just a minimum of army equipment.

Q. How did you destroy them, burn them up?

A. I don't recall, sir.

Q. Where were you when this destruction occurred?

A. I believe it was in San Francisco.

Q. Were there a number of letters you had from Alfred included in that destruction? [260]

(Testimony of Clarence Sadler.)

A. Yes; a great many letters from my mother and sister.

Q. And probably a great many of them had reference to the ranch property out here, is that right?

A. They had reference to the settlement of the quiet title suit and what action was taken previous and subsequent to the settlement of that suit.

Q. The quiet title suit, you refer to the suit brought by the Huntington & Diamond Valley Company against yourself and others in 1915?

A. Yes.

Q. And was settled or adjudicated in March, 1918? A. That is correct.

Q. In that destruction of correspondence, letters, etc., did you include any letters or written communications of any kind signed by Edgar Sadler, do you know?

A. I don't recall. There may have been some there, but I don't recall.

Q. Your correspondence with Edgar was very infrequent and sparse, wasn't it?

A. Yes, most of my dealings were with Alfred.

Q. You started out with him as your attorney in fact way back in 1912, didn't you?

A. 1912, yes sir.

Q. And subsequent to that time you gave other powers of attorney to him, did you not? [261]

A. I think I gave him power of attorney in connection with mines and the settlement, I think, of our suit against the Nevada State Bank & Trust Company; I don't recall.

(Testimony of Clarence Sadler.)

Q. Well, the powers were general, you remember that, do you not? A. Yes.

Q. Gave him very full and almost unlimited powers? A. Yes, full authority.

Q. So that whatever he did in respect to the property referred under those powers would be acceptable to you? A. It was.

Q. You feel you are bound by it?

A. Yes sir.

Q. How about acts of Alfred where he didn't act, didn't describe himself as attorney in fact?

A. Well, I don't think he had any authority to sign without putting down that he was attorney in fact.

Q. You wouldn't then assume responsibility, you are not disposed to assume responsibility for anything he did unless he did it in that capacity, is that right? A. That is correct.

Q. Where he signed as attorney in fact?

A. He signed as attorney in fact on the trust agreements and also on the stipulation.

Q. Well, I am not asking you about that, Mr. Sadler. [262]

A. Well, I am not going to argue the law question.

Q. Well, I don't want to argue it either, Mr. Sadler. I only want to get your attitude here. You feel you are not obligated for anything done by Alfred Sadler except where he signed as attorney in fact?

A. No; I think Albert generally signed as attorney in fact.

(Testimony of Clarence Sadler.)

Q. That isn't an answer, Mr. Sadler. I want to find out if your answer——

Mr. Thompson: Objected to on the ground it is too general.

The Court: I don't see that this covers any matter pertaining to direct examination or would tend to determine credibility or lack of credibility of the witness.

Mr. Cooke: I think when we get down to it, your Honor will see the materiality from our standpoint again.

The Court: Let us try just once more. Do you understand this question?

A. That is whether I have any objection to Alfred signing his own name.

The Court: Read the question.

(Question read.)

A. I believe that is correct. He usually signed my name and if he didn't sign my name as attorney in fact, he had no authority under the power of attorney. [263]

Q. Referring to this so-called trust agreement, I think you said that was signed by him as your attorney in fact?

A. No. This is what I had reference to: "thru the Power of Attorney" of Clarence T. Sadler.

Q. That is recital in the body?

A. Yes, that is what I had reference to.

Q. But the signature at the bottom is simply Alfred Sadler?

A. That is correct.

(Testimony of Clarence Sadler.)

Q. I think I asked you this question before, Mr. Sadler, but I do not remember just what kind of an answer I got. When you first saw this document, Exhibit 8, in May or June, 1918, you read it over doubtless with care, did you not? A. I did.

Q. You had no advance notice of it other than what you have already told us about, that you were informed there was such a document?

A. That is correct.

Q. But you had no copy of it and no detailed statement of just what it was? A. No.

Q. As a lawyer did or did it not occur to you that there was a necessity for your signing it?

Mr. Thompson: Objected to. Calls for conclusion of the witness.

The Court: Objection sustained.

Mr. Cooke: May we have an exception on the ground it is proper cross-examination.

The Court: You may have an exception.

Q. What did you do with that Exhibit 8 after you read it up in Carson City on that occasion?

A. Put it back in the box, returned it to its proper place.

Q. And that was in your mother's possession?

A. That was in the house.

Q. At Carson City? A. That is correct.

Q. When did you next see it?

A. I next saw it in 1920.

Q. Two years afterwards?

A. Approximately two years.

Q. And what was the occasion of your seeing it then?

(Testimony of Clarence Sadler.)

A. Well, I was appointed as an examiner by the Federal Trade Commission to sit at a hearing in El Paso and we completed taking testimony at El Paso and we adjourned to a hearing at Los Angeles, completed our hearing there, and I wired to my superior in Washington if it would be permissible for me to return East via Reno in order that I could return to my home and visit my family, and permission was granted and I returned to Carson City for two or three days' visit and while I was there I produced the box and looked into it and the agreement was there. My mother was getting very feeble at that time. [265]

Q. And after this occasion in 1920 when did you next see that paper?

A. I saw it after my mother died.

Q. That was in 1923, wasn't it?

A. That is correct.

Q. At that time I take it you and the other heirs were interested in knowing something about the status of the estate and that is why you saw the paper?

A. Yes, it was there and I told Alfred it would be all right for him to take it to Reno and keep it here for safe-keeping, keep it in Reno for safe-keeping.

Q. When did you next see the paper after that?

A. When Kathryn Powers Sadler gave it to me after Alfred's death.

Q. Sometime in '44?

A. That was in March or April of 1944.

(Testimony of Clarence Sadler.)

Q. Mr. Sadler, calling your attention to the meeting that you told us about that you had in Reno in 1931 at the Golden Hotel. Do you recall the persons that were there and were participating in the talk that you had at that time?

A. Edgar, Alfred and myself.

Q. Where did it take place in the hotel?

A. It took place, not in the lobby, in the sitting room there at the Golden Hotel. It is part of the lobby.

Q. Did you meet there by appointment or was that just accidental [266]

A. No, I think it was by appointment. I came up from California and suggested that we meet there.

Q. You don't mean that you met by appointment there to talk over this ranch subject, do you?

A. Primarily, yes.

Q. What other subject did you discuss?

A. We discussed politics, the legislature.

Q. In that conversation in regard to the ranch, isn't it a fact that you offered to sell whatever interests you had to Edgar or Alfred or either of them or both of them for six thousand dollars?

A. In the 1933 conversation I offered to sell—Alfred also offered to sell—our interests to Edgar for six thousand dollars apiece.

Q. Well, I am asking you now if that offer wasn't made in the talk at the Golden Hotel in 1931?

A. I think it was made in 1933?

(Testimony of Clarence Sadler.)

Q. And that was made out at the ranch?

A. No, that was made at the Golden Hotel. We had two conferences there.

Q. Oh, you had two conferences there? I misunderstood. One was in 1931 and one in 1933?

A. Yes, one was in 1931 and the other in 1933.

Q. And your best recollection is that the six thousand dollar [267] offer came up in 1933 and not in 1931?

A. That is my recollection.

Q. And probably I covered this already, but in the 1933 meeting were the same persons present?

A. The same persons were present, Edgar, Alfred and myself.

Q. And was that also in the sitting room in back of the lobby there? A. Yes.

Q. What did Edgar say in regard to the six thousand dollar offer?

A. Edgar said that was a fair offer and before we had the conference I discussed the matter with Alfred and Edgar said that was a fair offer and that he would try to get an additional loan from the Federal Farm Bank.

Q. Did you hear anything further from Edgar in regard to the six thousand dollar offer?

A. You mean the offer or the raising of the money?

Q. The offer.

A. No, I didn't hear a word from Edgar directly. I heard through Alfred Edgar was unable to get the money.

(Testimony of Clarence Sadler.)

Q. I asked you if you heard anything from Edgar?
A. Not directly, no.

Mr. Cooke: Right now I have nothing further.

The Court: Any further questions of this witness, Mr. Thompson?

Mr. Thompson: We have no further questions, your Honor. [268]

MRS. DORIS REBA SADLER

a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Will you state your name please?

A. Doris Reba Sadler.

Q. You are the wife of Clarence T. Sadler, the plaintiff in this case.
A. Yes.

Q. Are you acquainted with Edgar Sadler, the defendant?
A. I am.

Q. And when did you first meet him?

A. When I first met him is when we came out to Carson City, Nevada for the funeral in 1923, for the funeral of Mrs. Louisa Sadler.

Q. At that time were you present during any conversations regarding the Diamond Valley Ranch?

A. Yes.

Q. Who else was present at that time?

A. Well, Alfred and Edgar and my husband.

Q. Will you state what you recall of the conversation that took place at that time?

A. Well, they brought up the question of the

(Testimony of Mrs. Doris Reba Sadler.)

ranch and Edgar said he would like to sell it if he could because he was rather tired of ranching and I asked how much our share would be and he said he thought around 15 thousand dollars, according to what ranches were worth at that particular time.

Q. Do you recall anything else that was said at that time?

A. Just discussions about the ranch.

Q. Did Edgar Sadler say anything regarding what he would do?

A. Well, he said he would try to find a buyer when he got back.

Q. When was the next occasion that you met Edgar Sadler?

A. Well, we went out to the ranch in 1925.

Q. Who was with you at that time?

A. My husband.

Q. Did you overhear or take part in any conversations regarding the Diamond Valley Ranch at that time?

A. Well, I was present. I didn't take much part in it. There was conversation between Alfred and Edgar and Clarence and myself.

Q. The four of you were present? A. Yes.

Q. And will you state what you recall of the conversation that took place then?

A. Well, my husband brought up the question of the ranch and he said, "We would like to get our money out of it, our share", and Edgar said that at that particular time ranches weren't bringing much money and he thought it was a bad time to sell.

(Testimony of Mrs. Doris Reba Sadler.)

Q. Do you recall any other conversation regarding the ranch that occurred several years later?

A. Well, in 1939, I believe it was, Ethel and Edgar Sadler visited our home in Berkeley, California.

Q. Do you recall what the occasion of that visit was?

A. Well, her brother Tom had passed away.

Q. Ethel Sadler's brother Tom?

A. Yes, and after the funeral we asked them to come to our home and visit with us while we saw the Fair, as we were close to transportation that took them over to the Fair, and her sister Rebecca came too and she stayed a couple of days, then came back to Reno, and Ethel and Edgar stayed longer.

Q. And during the time that Edgar Sadler and Ethel Sadler were in Berkeley, did you engage in any conversation in regard to the Diamond Valley Ranch?

A. Yes, we did.

Q. Who was present during the conversation?

A. Edgar, Ethel and my husband and myself.

Q. Can you state the conversation as you recall it?

A. My husband brought up the ranch again and he said again he would like to get his money out of his share of it and again Edgar said ranches weren't selling for very much money and then my husband said, "Well, why can't the boys," that is Floyd and Reinhold, the sons, "since they are going to live out there, why can't they raise the money and buy my share," and I suppose he meant Alfred's too.

(Testimony of Mrs. Doris Reba Sadler.)

Q. Do you recall any reply made to that suggestion?

A. Edgar didn't make any comment.

Q. During any of the three instances to which you have referred in your testimony, did you at any time hear Edgar [271] Sadler say to Clarence Sadler that Clarence Sadler didn't have anything to do with the ranch? A. I did not.

Q. On any of those occasions did you hear Edgar Sadler say anything to Clarence Sadler that had the same meaning or import? A. No.

Mr. Thompson: You may cross-examine.

Mr. Cooke: We have no cross-examination.

The Court: Any further questions?

Mr. Thompson: No further questions, your Honor.

MRS. KATHRYN SADLER

having been previously sworn, was recalled on further

Direct Examination

By Mr. Thompson:

Q. Mrs. Sadler, I show you Plaintiff's Exhibit 40 for identification and the signature of Kathryn Power Sadler, is that your signature?

A. Yes.

Q. When and where did you sign that?

A. June 11, 1946, before Mr. Kearney.

(Testimony of Mrs. Kathryn Sadler.)

Q. Mr. William Kearney at that time was acting as your attorney? A. Yes he was.

Mr. Thompson: I offer Exhibit 40 for identification in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of the offer, Plaintiff's Exhibit 40 [272] for identification, on the ground that it is irrelevant and immaterial, not proper foundation has been laid or exists. It is incompetent in that it purports merely to be a declaration of a third party not connected with the defendant, Edgar Sadler or authorized in any manner to speak for him, hence the document, with its contents, would simply be the declaration and statement of the witness and not the declaration and statement of the defendant, Edgar Sadler. That the widow, the administratrix of the estate of Alfred Sadler, would be the trustee, with all due respect to your Honor's difference on that, and as such, and/or as co-tenant with respect to the ranch, she would have no authority to bind Edgar Sadler by any declaration which she made in writing or otherwise. That the document is in no way brought home to Mr. Edgar Sadler that he knew anything about it, that he participated in or became responsible legally for it in any way whatsoever. Your Honor, it seems to me, with all due respect to my opponents on the other side, we are carrying this proposition of declaration of co-tenant and defendant or a co-trustee, whatever it might be called, to a dangerous extreme. I have heretofore discussed

(Testimony of Mrs. Kathryn Sadler.)

the general subject, but this document here presents a different thing. It purports to be declaration of trust by Kathryn Powers Sadler, as administratrix of the estate of Alfred R. Sadler, in which she, without any personal knowledge, or very little personal knowledge, of the subject matter undertakes to make admissions in this declaration to the effect that so far as she is concerned she is holding as a co-trustee this [273] ranch. There is, of course, nothing in here to the effect that Edgar Sadler is a co-trustee, further than she states that the agreement—it is a construction of her own—that the agreement between all the heirs of Reinhold Sadler——

The Court: I have not seen the agreement, but if that agreement is a declaration of Kathryn Powers Sadler, if she is holding this land as a trustee, I will sustain the objection.

Mr. Cooke: That is what it is, your Honor. She is holding an interest in it with Edgar Sadler as trustee.

The Court: Because I don't think she is a co-trustee or trustee at all.

Mr. Thompson: She doesn't claim to be trustee.

The Court: Then I cannot see that her declaration will be of any value whatever. Objection will be sustained.

We will take our recess now a little earlier than usual as a mark of respect to our deceased friend, George B. Thatcher. We will be in recess in this case until tomorrow morning at 10:00 o'clock.

(Recess taken at 4:30 p.m.) [274]

Thursday, October 17, 1946, 10:00 A.M.

Appearances same as at previous session.

MRS. KATHRYN POWERS SADLER

resumed the witness stand.

The Court: I think before we took our recess, Mr. Thompson, you had offered Exhibit 40.

Mr. Thompson: Yes, your Honor. At this time I respectfully move that your Honor withdraw your ruling on that exhibit so I can explain its character.

The Court: Motion will be granted.

Mr. Thompson: This is a declaration, your Honor, that has been filed and recorded by Kathryn Powers Sadler as administratrix of the Estate of Alfred Sadler, deceased, and we offer it as an admission or declaration against interest. In addition to describing the property known as the Diamond Valley Ranch, I wish particularly to call your Honor's attention to the portion beginning on line 25 of page 2, as follows:

"That the undersigned, as the duly appointed, qualified and acting administratrix of the estate of said Alfred Sadler, does hereby declare that the said Alfred Sadler during his lifetime did hold jointly with said Edgar Sadler, the debtor, legal title to the property hereinbefore described in trust for the heirs of Reinhold Sadler, deceased, in accordance with the agreement attached hereto as Exhibit "A."

(Testimony of Mrs. Kathryn Powers Sadler.)

I think, your Honor, as I understand your comment at the time of the ruling yesterday, was under the impression that it was a declaration that she, as administratrix, held the property in trust. It is not such a declaration, but is a declaration against her interest as the representative of the estate of the deceased co-trustee and shows that, insofar as Kathryn Sadler is concerned as administratrix, and insofar as the estate of Alfred Sadler is concerned, the title to the Diamond Valley Ranch, under the decree in the quiet title suit, which vested the title in Alfred and Edgar Sadler, was a joint trust title.

Mr. Cooke: The defendant, Edgar Sadler, renews the objection as stated to the offer of the Exhibit 40 for identification last evening. We specifically object upon the ground that this is hearsay, that the declarations made in the document by the witness is not any evidence as to Edgar Sadler, whether relation of co-trustee existed or not. That in the case of two trustees and one dying, the surviving trustee would be the sole trustee and that Kathryn Powers Sadler is not a trustee at all under that rule. I think that was your Honor's holding before, since which time I have made an investigation of that phase. The declaration, so called, was filed after the suit was commenced and cannot be anything more than the mere statement on hearsay of this witness, based upon what some one else, presumably Alfred Sadler, told her. She doesn't pretend she has any personal knowledge of it and I

(Testimony of Mrs. Kathryn Powers Sadler.)

think this declaration is the same thing as going on the stand and testifying that Alfred told her [276] he had this interest and Edgar was trustee and soon, so we have this hearsay and this is incompetent and irrelevant, hearsay and we also have violation of the dead-man rule, it seems to me, because that is all that document can possibly amount to. It is an indirect way of getting incompetent and irrelevant testimony before the Court. The fact that it is put in the form of a written document and had a recording and all that, does not make it of any higher degree than some oral statement that Alfred told her these things and so far as she is concerned she acknowledges the truth of that, or something of that kind.

Mr. Thompson: Well, if the Court please, we do not offer it as binding as to Edgar Sadler. We offer it merely to show that insofar as the interest of the estate of Alfred Sadler is concerned, the title, which the record at the time of his death showed to be vested as an undivided one-half interest as a tenant in common in the deed, was a joint trust title and that his estate does not claim to own an undivided one-half interest in the ranch and declares that the entire legal title is now vested in Edgar Sadler as surviving trustee, subject to the provisions of the trust. It shows the legal position of the estate of Alfred Sadler. I would like to call your Honor's attention to the case of Sime against Howard in 4 Nevada, which holds that a declaration of trust may be signed and recorded at

(Testimony of Mrs. Kathryn Powers Sadler.)

any time and does not have to be made at the time of the creation of the trust. There are many other cases to the same effect.

Mr. Cooke: I don't make any question about that, if [277] it is made by the proper party and it is offered as evidence in the proper way in a proper case, the time of its filing and recording is immaterial, but counsel's statement here that they wish to show that this is a joint trust, of course means that it is a tendency to show that Edgar Sadler was a trustee. It is offered for the purpose of showing that Edgar Sadler is not entitled to prevail in this case. It is offered for the purpose of showing that Clarence Sadler is entitled to prevail, otherwise there would be no occasion to be offered at all. We are not concerned with the claim of Alfred, what he is claiming, by his legal representative. We do not make any point about Alfred Sadler or his being a co-tenant in the ranch, but to have this kind of document come in here and offer it as evidence against Edgar Sadler, we do strenuously object and think it would be very gross error.

The Court: The point that presents itself is this: Has an administratrix or executor the right or power to set out a certain parcel of property and by declaration as administratrix effect that property with particular character. Does this 4 Nevada case have anything on that point?

Mr. Thompson: No, your Honor, it was to the point, as I explained, as to time when declaration might be made.

(Testimony of Mrs. Kathryn Powers Sadler.)

The Court: It could be made by the party holding the title?

Mr. Thompson: Yes, your Honor. [278]

The Court: The party holding a legal title to property may at any time make a declaration as to the nature of that title and if it happens he is holding it in trust, he could so declare, but I am not so certain about the power of an administrator. For instance, John Doe dies and leaves property. Jim Smith is the administrator. Jim Smith might or might not be connected with the family, might be a public administrator. Can he effect a title of property by a declaration of his?

Mr. Thompson: Well, if the Court please, statutorily at common law title to real property vested absolutely in the heirs upon the death of a owner and that is still the rule, except as to this Nevada statute, which vests control of the property during the course of the administration in the administrator and empowers him or her to bring a definite action and do many other things with regard to the property that could not be done in the absence of that enabling statute. I do not have the citation of that statute readily available, but I can find it.

The Court: The objection is sustained and Exhibit 40 will not be admitted in evidence.

Mr. Thompson: You may cross-examine.

Mr. Cooke: I do not think we have any cross-examination.

(Testimony of Mrs. Kathryn Powers Sadler.)

Mr. Thompson: I believe, your Honor, that the defendant [279] will stipulate that the claims filed against the estate of Reinhold Sadler, deceased, in the estate proceeding brought in the First Judicial District Court of the State of Nevada, in and for the County of Ormsby, which were allowed and approved by the administratrix and the court aggregated the sum of \$25,103.25. I understand that stipulation will be made, subject to the right to correct the aggregate figure quoted in the event that it is found to be in error.

Mr. Cooke: And as to the fact that they were allowed, may we have the same stipulation there?

Mr. Thompson: That would be included. Well, the aggregate of the claims allowed and approved by the administratrix and the court was \$25,103.25, is that stipulation satisfactory, Mr. Cooke, subject to the right of correction of the amount prior to the settlement?

Mr. Cooke: If we should find any. I do not know off-hand, but I should like to reserve the right in case we do find any.

The Court: That stipulation then is satisfactory to both sides?

Mr. Cooke: Yes.

Mr. Thompson: Also that the real property belonging to the Reinhold Sadler estate listed in the inventory as a house and lot in Block No. 7, Phillips Addition, Carson City, Nevada, was during the estate proceedings by decree set over to Louisa Sadler, the widow of Reinhold Sadler, as a home-

(Testimony of Mrs. Kathryn Powers Sadler.)

stead. Will you [280] stipulate that is correct, Mr. Cooke?

Mr. Cooke: Yes, I think so. I think that is the fact. The records so show.

The Court: The stipulation will be satisfactory?

Mr. Cooke: Yes.

Mr. Thompson: Plaintiff rests, your Honor.

Mr. Cooke: We did not know that plaintiff would rest his case at this time and we would like to have a few minutes' recess.

The Court: The court will be in recess for 15 minutes.

(Recess taken at 10:30 a.m.)

10:45 A.M.

Mr. Cooke: If the Court please, at this time the plaintiff having rested, the defendant, Edgar Sadler, moves the court that a non-suit be rendered, upon the grounds that the plaintiff has failed to make a proper case to go to the court on the merits, for the reason, firstly, there is no evidence that at the time he died in 1906 Reinhold Sadler was the owner of the property described and referred in Paragraph 2 of Plaintiff's Amended Complaint, nor the owner of any interest in the property so referred to and which property is involved in the case. Secondly, that the plaintiff has failed to prove or show by any competent testimony or evidence tending to show that he had any interest in the Diamond Valley Ranch property or the equipment or any of the property described in [281]

the complaint in issue in the case, by reason of his being an heir of Reinhold Sadler, deceased; and thirdly, that there is no evidence to show that there was any consideration for the alleged and so-called trust agreement of March 2, 1918, in that there is no evidence that any consideration of any kind was passed at that time to or by or through or from Edgar Sadler for the making of the agreement, if it was made, and no evidence to show that the plaintiff had any interest in the property, whether by inheritance or otherwise, that would supply a consideration; fourthly, the trust agreement, so-called, of March 2, 1918, is not an agreement at all, in that it is obviously incomplete, in that it is not signed by the parties necessary to the completion of the agreement, in that only two at most have signed but that if the plaintiff and the other parties to that document claimed they had any interest, whether legal or equitable, in the property, their signatures to the agreement are just as requisite as the signatures of those holding the legal title, and not having been made, the agreement is unenforceable by a court of equity; fifthly, the paper denominated Exhibit 8, being the so-called trust agreement, does not purport on its face to create or constitute a trust, either by expressed terms or otherwise, but is merely at most an agreement, tentative or otherwise, between the parties mentioned for the sale of the ranch property and the livestock at the first advantageous opportunity or offer and for division of the proceeds and that this does not

constitute what equity denominates a trust; [282] sixthly, that the document shows on its fact that it is indefinite and remote in point of the title vesting; that is to say, the document offends against perpetuation, in that there is no requirement in the document that the legal title supposedly held by Alfred and Edgar Sadler must necessarily vest at any particular time, either within the period proscribed by rule against perpetuity of life for 21 years or thereafter or any other time, and that therefore the document is void against public policy and particularly in violation of that rule in that above stated. Alfred Sadler and Edgar Sadler, as well as the others, could continue their agreement far beyond the time limit by the rule against perpetuation and there is nothing in the document that would entitle any one interested in it to enforce by legal procedure a prosecution of the agreement at any time, either within or after the period of perpetuation. Those, I believe, constitute the chief points and the controlling points as we see them, as against the case made by the plaintiff. Of course, that does not take in the proposition of laches which we have set up in our answer, because this motion, as I understand it, is determinable solely upon the case as made now before the court, upon the evidence and the admitted facts. The question of the rule against perpetuity, we think, is a very serious one and we are prepared to present some authorities that we think are squarely on point in that. So far as that it concerned, that is merely a question of

law, and so with the document denominated the trust agreement. That is also solely governed [283] as a matter of law. It cannot be helped by any oral testimony under the mandate of the statute, and all of the evidence that is in would go, as counsel in effect admitted, for the purpose of voiding the apparent laches in time in commencing of the suit. Now if the Court wants us to present argument at this time, we are willing to do so, or if the Court prefers to make a formal ruling and without prejudice, we may renew the contentions later on, we are willing to do that. In other words, we do not want to argue the matter now at length unless the Court feels that that is a proper procedure. In other words again, we are in the hands of the court on the matter, but we feel to be consistent and to save the record we should present the motion, informally at least, and we will present it with complete argument if the Court so desires.

The Court: I understand that this will be in the nature of motion to dismiss under Rule 41, subdivision (b).

Mr. Cooke: Well, I confess we did not have any particular rule in mind. We just followed the whole evidence.

(Court reads Rule 41.)

Mr. Cooke: Yes, that seems to fit the case.

The Court: The motion will be denied.

Mr. Cooke: Of course this goes in with our general stipulation as to exception.

The Court: You may have an exception to the ruling.

Mr. Cooke: We are compelled to change our order of [284] proof somewhat by reason of the closing of plaintiff's case earlier than we expected. We will call Mr. Eccles.

JOHN ECCLES

a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. Will you state your name please?

A. John Eccles.

Q. Where do you reside, Mr. Eccles?

A. Hayward, California.

Q. What is your business or occupation?

A. Well, at the present time I am retired on disability from the railway mail service.

Q. You were formerly employed in the railway mail service? A. Yes, sir.

Q. Are you a married man? A. Yes, sir.

Q. Are you related to either Edgar Sadler or his wife in any way? A. Yes, I am.

Q. What is the relationship?

A. Mrs. Sadler is my sister.

Q. Did you ever do any farming or engage in any farming activities in the vicinity of the Sadler Ranch in Eureka County?

(Testimony of John Eccles.)

A. Yes, I owned a ranch there from 1915 to 1928.

Q. Do you own it now? [285]

A. I still do.

Q. You acquired that ranch in 1915?

A. Well, my mother had it at that time. I bought it from her in 1925.

Q. What I was getting at, Mr. Eccles, when did you first take any interest in ranching activities in or near the Sadler ranch? A. 1915.

Q. Before that where did you live?

A. Well, lived at Ruby Hill or Eureka.

Q. And prior to 1915 you had no experience in farming out in that region?

A. Well, my father ran his cattle there at Sadler's place a number of years.

Q. What were you doing?

A. Well, I was going to school.

Q. Prior to 1915 then is it true that you had very little personal knowledge of the ranching, cattle raising activities, out there of your father, Sadler's etc.?

A. Well, I didn't have much, no.

Q. Beginning in 1915 just what did you do with regard to any information as to conditions on the Sadler ranch, with regard to the cattle?

A. Well, we run our cattle together and branded them together.

Q. What was your brand?

A. T E on the left hip. [286]

Q. And the Sadler brand was what?

A. Two half circles.

(Testimony of John Eccles.)

Q. And about how many cattle, approximately, did you run, your father's?

A. Well, at that time we had 125.

Q. And in 1915 you ran your cattle along with the interlocking circle cattle of Edgar Sadler's, tell us, if you can, about how many of those cattle there were.

A. The half circle?

Q. Yes.

A. I would say along about 200 head.

The Court: Is that prior to 1915?

A. 1915, when I went there.

Q. That is what you found when you went there?

A. Yes, sir.

Q. Where were they running, what particular ranch in name?

A. Well, we called it North End Valley, around Union.

Q. When you say they were run together, would you have the round-up at the same time and brand at the same time?

A. Oh, yes, our cattle were always together.

Q. Did that condition continue down to 1918, for instance?

A. Yes, sir.

Q. And did it continue after that?

A. Yes, sir.

Q. How long afterward? [287]

A. Well, until I left the ranch in '28.

Q. In '28?

A. Yes, sir.

Q. What part did you have in the work? Did you ride the range and help the branding, or what did you do?

(Testimony of John Eccles.)

A. Well, I did practically all the riding, yes, and I branded the calves.

Q. And on those occasions would there be some one from the Sadler family with you or would you be doing it alone?

A. Well, we usually had hired help.

Q. You were there, I take it, from what you have already testified, in March, 1918?

A. Yes, sir.

Q. Do you remember anything about what took place at that time in regard to any change in ownership or operations of the Sadler ranch?

Mr. Thompson: Objected to on the ground it calls for conclusion of the witness and the record regarding ownership of the ranch is the best evidence.

The Court: Objection overruled. You may answer the question.

(Question read.)

A. Well, it was operated on the same basis.

Q. From 1915 to March, 1918, who, so far as you know, was in charge of the Sadler ranch and the livestock, etc.? [288]

A. Edgar Sadler.

Q. And in March of 1918 and following that what was the condition and who was in charge of operating the ranch?

A. Edgar Sadler.

Q. From that time on down to 1928 when you left, who was in charge and operating the Sadler ranch?

A. Edgar Sadler.

(Testimony of John Eccles.)

Q. Did you have occasion to know anything about the number of cattle, livestock, that were on the ranch in March, 1918, on the Sadler ranch?

A. Yes, I did.

Q. What were the brands that you knew of cattle on the ranch at that time?

A. Well, two half circles and the J C brand as we call it.

Q. To whom, do you know, did the two half circles, or interlocking half circles—is that right?

A. Two half circles we call it.

Q. —belong, if you know?

A. Belonged to Edgar Sadler.

Q. Did you know of another brand, some cattle that had another brand at that time?

A. J C cattle.

Q. Is that J C or J bar C?

A. Really J bar C, yes.

Q. Called J C for short? [289]

A. That is what we called it.

Q. Where were the J bar C cattle running in regard to the half circle cattle?

A. Well, running together.

Q. How long prior to March had that condition continued? A. Well, since I been there.

Q. That would be from 1915? A. Yes, sir.

Q. About how many of the J bar C cattle were there in March, 1918?

A. Well, I would say 20 or 25 head.

Q. What was the character of the stock as to their apparent age or the like? Can you tell us anything about that?

(Testimony of John Eccles.)

A. Well, I would say they were old stock, yes.

Q. Well, what was there about them that indicated to you that they were old stock?

A. Old cattle, you could tell an old cow.

Q. You mean a cow man can tell by looking at them? A. Yes, an old cow, yes.

Q. They just look old? A. Look old.

Q. Calling your attention to some time in the spring of 1946, did you visit Mr. Clarence Sadler at his home in Berkeley? A. Yes, sir.

Q. What time in the spring of 1946 was that?

A. Well, I would say it was the early part of the spring. [290]

Q. What was the occasion, or was there any particular occasion?

A. Well, went out for a visit and I thought I might act as a peacemaker between Edgar and him. I could establish the exact date because we went to a wedding on that day and went over after the wedding.

Q. Who was getting married, any relatives of the Sadlers?

A. No, a postoffice clerk, and we went to the wedding and then on up to Clarence's.

Q. You told us that you on that occasion brought up the matter of settlement of some kind between Edgar and Clarence?

Mr. Thompson: When did he testify to that?

Mr. Cooke: Just now.

Mr. Thompson: We object to the question as leading.

(Testimony of John Eccles.)

The Court: Let us have the question and answer.

Mr. Thompson: He said he acted as peacemaker.

(Last question and answer read.)

The Court: Objection sustained.

Q. Well, you went there to make peace, is that right? A. Yes, sir.

Q. What was the peace that you had in mind?

A. I thought the two brothers could get together and settle without going to court.

Q. Did you have any conversation with Clarence in regard to the matter at that time?

A. I did. [291]

Q. Where did that take place?

A. Well, at his home.

Q. At his home in Berkeley?

A. At Berkeley.

Q. Who else was present at the time?

A. Well, his wife was there and my wife and Clarence's little girl.

Q. What is the little girl's name?

A. Shirley, I think it is.

Q. Did you have any conversation with him at that time in regard to making peace?

A. Yes, I did.

Q. What was said?

Mr. Thompson: Objected to on the ground that any matter relating to a settlement or a possible offer and compromise is immaterial and incompetent.

The Court: Sounds like a good objection, Mr. Cooke. Objection will be sustained.

(Testimony of John Eccles.)

Mr. Cooke: We ask for the benefit of an exception on the ground that this does not come within the rule of excluding testimony in the case of compromise, because the evidence here does not show that this witness was authorized to make any compromise on behalf of Edgar Sadler or on behalf of anybody. He is merely a relative and friend of the family and volunteered to discuss the matter with Clarence Sadler with the idea of helping——

The Court: I will withdraw the ruling. You may answer the question.

(Last question read.)

A. Well, I said to Clarence, "Why don't you and Edgar get together." First I said, "What happened between you and Edgar?" I said, "Why don't you get together and settle it." He said, "I offered to settle it and he always told me I didn't have anything to do with it and now it is in court."

Q. Was there any time mentioned by him as to when he had offered to settle?

A. Well, he said in 1930, yes.

Q. Just how did he bring in the 1930 in the conversation?

A. Well, he said, "I offered to settle back in 1930."

Q. Did he mention any figure?

A. He did not.

Q. What else was said, if anything, by either you or him in regard to the subject of the dispute between him and Edgar?

(Testimony of John Eccles.)

A. Well, we talked for some time; wanted to see how they could dispose of it; thought probably Reinhold would buy it.

Q. Who mentioned that?

A. Clarence, and he also showed me the answer—I don't know what you call it, but I imagine the complaint, the answer Edgar sent back.

Q. So far as you know, it was the answer Edgar Sadler made in this case? [293]

A. Yes, I imagine that is what you would call it.

Q. Did you read it over?

A. I read parts of it, yes.

Q. Have you told us all of the conversation, as near as you can recall it, that took place at that time? I mean in regard to the ranch and its affairs and this dispute?

A. Well, practically, yes, I can't think——

Q. Well, "practically." If there is anything more, I wish you would state it.

A. I can't think of anything more at present.

Q. What were the ladies doing there, Clarence Sadler's wife and your wife, while you and Clarence were talking? How were they employed?

A. Mrs. Sadler was telling my wife about an operation she had had.

Q. Were they talking about that at the same time you and Clarence were talking about the ranch as you have testified? A. Yes, sir.

Q. Did either of the ladies offer any suggestions or attempt to participate in the conversation between you and Clarence?

A. Well, no, not right——

(Testimony of John Eccles.)

Q. How long did you stay there on that occasion?

A. Well, we stayed there an hour or more.

Q. The ranch that you owned and formerly operated adjoining the old Sadler ranch I think you told us was under lease to the Sadlers? [294]

A. Yes, sir.

Q. To whom, Edgar Sadler?

A. Edgar Sadler, yes, sir.

Q. What rental are they paying for that ranch?

A. Well, at first we rented it for \$400 a year and at present I am receiving \$300 and he always pays the taxes on it.

Q. What kind of lease is that in regard to the length of term?

A. Well, just from year to year.

Q. Is it a written lease?

A. Yes, it is written.

Q. It is a lease from year to year?

A. Well, I imagine that is what it is. It has been going on from year to year. I don't know if it is for less or not.

Q. It has been running on since when?

A. Since 1928.

Q. That is when you left? A. Yes.

Q. You left at that time to go——

A. To California, yes, sir.

Q. And since 1928 have you made any visit to the ranch out there and kept in contact with it or not?

A. Yes, sir, I have.

Q. About how often?

(Testimony of John Eccles.)

A. Well, not very often. I have been back three or four times. [295]

Q. Since 1928? A. Yes, sir.

Q. Has there been any change or any improvement made with regard to your ranch by Mr. Sadler since 1928?

A. I imagine he has built some fence; practically all.

Q. How about the cultivated land?

Mr. Thompson: Objected to. It is irrelevant and immaterial. Mr. Eccles' ranch isn't involved in this case.

Mr. Cooke: It is involved. It is set up in our answer. It is part of our holding and we have been operating that in connection with the Sadler ranch.

The Court: I can't see where that would be material. Objection sustained.

Mr. Cooke: I would like to make an offer of proof in this connection.

The Court: All right.

Mr. Cooke: That I think it would show by this witness that since 1928 Edgar Sadler has, while in possession under the lease, expended substantial sums of money in developing new ground and new acreage, plowed acreage, pertaining to the Eccles leased land and additional crops have been put in and a good deal of work has been done by way of improving the entire fence condition and repairing and new fences.

(Testimony of John Eccles.)

The Court: May I ask if the plaintiff in this case claims any interest in that lease by virtue of this [296] action?

Mr. Cooke: I do not know.

The Court: If the plaintiff does, I will say then maybe this evidence will be material.

Mr. Cooke: I can't answer that.

Mr. Thompson: We do not claim that the trust should be impressed upon any of Mr. Eccles' ranch, your Honor.

The Court: The question I had in mind is whether or not it is claimed that the trust should be impressed upon any interest that Mr. Edgar Sadler has in this lease.

Mr. Thompson: No, your Honor.

The Court: Objection will be sustained.

Mr. Cooke: I might add, for the information of the Court, that we weren't offering it on the basis of any claim by Clarence's interest in the lease, but rather offering it as a part of the defense of laches which is based upon our operations out there and the work that we did in reliance on the condition which we claim that the plaintiff himself created.

The Court: The ruling will stand.

Mr. Cooke: I think that is all.

Cross-Examination

By Mr. Thompson:

Q. Mr. Eccles, are you familiar with the Diamond Ranch?

A. Diamond Valley Ranch, yes, sir. [297]

(Testimony of John Eccles.)

Q. Is that the same ranch you have referred to in your testimony as the Sadler ranch?

A. Yes, sir.

Q. One of the brands has been described in the testimony in two ways. I think Mr. Cooke described it as an interlocking quarter circle brand and you said two half circles. Are you talking about the same brand?

A. I imagine so, yes. We call it two half circles. Mr. Cooke, I assume, is referring to the same brand.

Q. What cattle that you saw on the Diamond Ranch between 1915 and 1918 which you claim belonged to Edgar Sadler bore the two half circle brand, is that it? A. Yes, sir.

Q. How long had cattle bearing that brand been grazing on the Diamond Ranch, so far as you know?

A. Well, I went there in 1915 and I know they had been grazing long before that.

Q. At that time did you know whether Edgar Sadler was operating the ranch for others? Did you know yourself? A. I did not.

Q. He might have been operating it for others, so far as you know?

A. He might have, I didn't know.

Q. All you know that he was there and he was in charge of the ranch operation?

A. That's right, and I thought he owned it. [298]

Q. But that is the limit of your knowledge about it, is that he was there? A. Yes, sir.

Mr. Thompson: I move that the statement, "I thought he owned it" be stricken, your Honor.

(Testimony of John Eccles.)

The Court: All right. It may go out.

Q. The same applies to the cattle on the ranch, does it not, Mr. Eccles? A. Yes, sir.

Q. You knew that Mr. Edgar Sadler was there on the ranch, that he was taking care of and managing those cattle, is that true?

A. That's true.

Q. But you don't know whether he was managing them for somebody else?

A. No, I don't know that.

Q. In the spring of 1918 how many cattle altogether were on the Diamond Ranch?

A. Including everybody?

Q. Yes.

A. My own—well, I would say about 220 or 225 head.

Q. I mean altogether, including your cattle?

A. Oh, not including ours, no, not including my own. Well, there were over 300.

Q. Were the J bar C brand and the two half circles brand the only two brands that were used by the Sadlers at that time? [299] A. Yes, sir.

Q. And the other cattle on the ranch bore other brands, is that correct? A. That is correct.

Q. They all ran together?

A. They all ran together, yes.

Q. Now in March, 1918, how many head of cattle bearing the two half circle brand were on the ranch, if you recall?

A. Oh, I would say around 200 head.

Q. Wasn't it in December, 1945, that you visited Clarence Sadler in Berkeley?

A. It may have been, yes.

(Testimony of John Eccles.)

Q. How long had it been since you had visited him there?

A. Well, I hadn't been there, to this particular house of his before.

Q. How long had it been at that time since you had visited him at any other house?

A. Several years.

Q. You went there specifically to talk about the dispute between Edgar and Clarence, is that correct?

A. Well, yes, visit at the same time.

Q. And just before that time you had been at the Diamond Valley Ranch talking to Edgar, had you not?

A. I had been to the Diamond Valley Ranch that fall, yes, or was it that fall? Yes, it was last fall. [300]

Q. Now as I recall your testimony, Clarence Sadler told you that he had offered to settle his interest with Edgar in 1930, as you remember it?

A. That is what I recall, yes.

Q. And he also said that he had tried to get, I think you said Rinie, to buy it, is that right?

A. No, I didn't say——

Q. Well, I misunderstood.

A. No, I said when we were talking about the ranch, Clarence said "Maybe Reinhold would buy it."

Q. And who is Reinhold? To whom was he referring?

A. Reinhold Sadler.

(Testimony of John Eccles.)

Q. That is Edgar Sadler's son?

A. Yes, sir.

Q. Didn't Clarence Sadler tell you at that time that shortly after Alfred Sadler's death, Edgar Sadler had told him that he didn't have any interest in that? Don't you recall Clarence telling you that?

A. I do not.

Mr. Thompson: That is all.

Re-Direct Examination

By Mr. Cooke:

Q. Mr. Eccles, with reference to the brand you call the half circle, did you hear of anybody claiming those cattle outside of Edgar Sadler?

A. I never did, no.

Mr. Cooke: That is all. [301]

MRS. ETHEL SADLER

a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. State your name, please, Mrs. Sadler?

A. Ethel Sadler.

Q. You are the wife of Edgar Sadler?

A. I am.

Q. Where do you reside, Mrs. Sadler?

A. On the Diamond Valley Ranch in Eureka County.

(Testimony of Mrs. Ethel Sadler.)

Q. How long have you resided there?

A. Ever since I was married, with the exception of four years when my daughter was going to high school. I had my sister's three girls here with me, put them in school at the same time.

Q. When were you married, Mrs. Sadler?

A. I was married September 11, 1907.

Q. And ever since, with the exception of the four years you just mentioned, you have resided on the ranch?

A. I have.

Q. Who were the other members of the family residing there at the same place with you and your husband right after you were married? Anybody else beside you and him?

A. Well, we had an old uncle, called him Uncle Charlie. He was a brother of Reinhold Sadler's.

Q. Reinhold Sadler, Sr.?

A. Yes. [302]

Q. And he continued to live there for some time, did he?

A. Well, I would say for several years.

Q. And what, in a general way, were your duties at the Ranch? What did you do?

A. Well, I did everything. I cooked for the hay crews; I did everything.

Q. You had help occasionally, did you?

A. Well, the hired girl in haying time.

Q. And that has continued in that same general way from 1907 down to date?

A. Yes.

Q. With the exception of four years you were away from there?

(Testimony of Mrs. Ethel Sadler.)

A. Well, Reinhold's wife, when he was married, she helped me. Just after we were married, too, we had a Chinaman. I was young then and I wasn't much of a cook.

Q. You know Clarence Sadler, the plaintiff in this case? A. I do.

Q. When did you first meet him?

A. Well, he came to the ranch, I believe, a short time after we were married. My husband was in the Legislature and that's the first time, I think, I met Clarence Sadler, I think it was in the Legislature. They had a special session.

Q. Do you know about what year that was?

A. That wasn't long after we were married. That must have been the year we were married. It was 1907. [303]

Q. It was then that you first met Clarence?

A. Yes.

Q. And did he remain there in that vicinity for any length of time then?

A. He was at Carson City with his folks. That is where we met Clarence.

Q. You met him at Carson City, not at the ranch? A. No.

Q. After the legislative session was over, you and your husband returned to the ranch, did you?

A. No, we went down to Berkeley for a little visit.

Q. Yes, I know, but after that you went back to the ranch and resumed your ranching activities?

A. Oh, yes.

(Testimony of Mrs. Ethel Sadler.)

Q. When did you next see Clarence Sadler at the ranch?

A. Well, after we were married he used to come out and hay for us in the haying season.

Q. How often would that be?

A. Well, I can't be sure of that. I would say maybe two or three different times.

Q. Would that be before or after 1918?

A. Oh, that is before.

Q. Do you know where Clarence Sadler was in 1918? A. Washington, D. C.

Q. About what year or years was it that he was out there helping [304] with the hay?

A. That was after I was married, after 1907.

Q. Prior to 1918? A. Yes.

Q. How long prior to 1918 would you say?

A. Oh, well, I would say it might be about eight years.

Q. Then for eight years or so immediately preceding 1918 he wasn't on the ranch? A. No.

Q. And after March, 1918, can you tell us when you next saw Clarence Sadler?

A. 1925, in July of 1925.

Q. Where was that?

A. That was at our place. Reba and Clarence came for a visit.

Q. When you say Reba, that is Mrs. Clarence Sadler? A. Yes.

Q. How long did they remain at that time?

A. Well, I would say five or six days.

(Testimony of Mrs. Ethel Sadler.)

Q. What was Clarence Sadler doing out there during that period? A. Just visiting.

Q. Well, how did he employ his time; stay around the house, hunting, or working?

A. No, he was always outside. He wasn't in the house much. Hunting.

Q. And his wife stayed and visited with you in the house. [305]

A. She did.

Q. Did you hear any conversation between your husband and Clarence Sadler in regard to the ranch conditions at that time? A. I did.

Q. With reference to the time that Clarence and his wife landed there, when did that conversation take place? How soon after about?

A. Well, I would say it was a day or two before they left.

Q. And where did the conversation take place?

A. Well, it took place in our kitchen. I was cooking and we had a flood the day before and these two big rooms that we had built belonged to the bunk house, wasn't fixed, and this big flood, the water came right through the living room window.

Q. And the conversation that you just testified about the ranch between your husband and Clarence Sadler took place after the flood?

A. Yes, we were in the kitchen. We had rainy weather.

Q. Who were present beside you and your husband and Clarence?

A. Reba, Clarence and Edgar and I.

Q. Just the four of you? A. Yes.

(Testimony of Mrs. Ethel Sadler.)

Q. Tell us what was said and who said it, in regard to the ranch conditions, particularly in regard to any claim of Clarence Sadler's to the ranch.

A. Well, Clarence Sadler said he was going over and start something [306] with Edgar Plummer and Edgar told him that when his father died he was only managing the Diamond & Huntington Valley ranches, that is what Edgar told him, and he said he bought the ranch in 1918 and Clarence hadn't anything to do with it.

Q. Who said that? A. Edgar.

Q. That is your husband? A. Yes.

Q. Did Edgar make that statement?

A. Yes, and Clarence never said another word and the next day we went to visit Plummers. We took them over to Plummers; we were with them and he never said a word then there to Edgar Plummer.

Q. Did Clarence make the statement he was going over to see Edgar Plummer after or before your husband told him that he bought the ranch in 1918 and Clarence didn't have any interest in it?

A. Do you mean that day he was there or that time?

Q. No, I am trying to find out the order in which the subject was discussed.

Q. Well, he said in this conversation that he was going to see Edgar Plummer.

Q. Was that before or after Edgar told him he didn't have any interest in the place?

(Testimony of Mrs. Ethel Sadler.)

A. Edgar told him right after that, that he didn't have any interest in the place. He bought it in 1918.

Q. What I was trying to find out, Mrs. Sadler, was just what led [307] up to Clarence's saying he was going over to see Edgar Plummer. Did he say what he was going to see him about?

A. See about the ranch, to start something.

Q. What, if anything, had been said immediately preceding his statement that he was going over to see Edgar Plummer about starting something, what led up to that?

A. Well, when Edgar and Clarence were together they were always dickering about the ranch.

Q. Have you told us now all that you recall about that particular conversation?

A. Yes, I have. What struck me at the time was that after Edgar told him he never said any more. I think that is what impressed it on me.

Q. After Edgar told him he bought the ranch in 1918 and Clarence didn't have any interest in it, Clarence didn't say anything more?

A. He didn't say any more.

Q. When, if at all, were you next present at any conversation between your husband and Clarence in regard to ranch conditions? A. 1938.

Q. Where did that conversation take place?

A. That conversation took place in the living room.

Q. At the ranch house? A. Yes.

Q. Who was present on that occasion?

A. Floyd Sadler was present. [308]

(Testimony of Mrs. Ethel Sadler.)

Q. Your son?

A. My son, yes; Edgar Sadler and Clarence Sadler and I was cooking. I was back and forth from the kitchen into the living room.

Q. And did you overhear any conversation between your husband and Clarence in regard to Clarence's claimed interest in the ranch?

A. The time I went in he was telling about these millionaires down in Los Angeles buying ranches.

Q. Who was?

A. Clarence, and he wanted to list these ranches. Edgar always got cross when Clarence brought anything up like that and he said, "You haven't got anything to do with it."

Q. What did Clarence say to that, Mrs. Sadler?

A. Clarence never did say anything after that when we said things like that to him. He never said anything.

Q. Was there any subsequent time when you had any conversation or overheard any conversation between your husband and Clarence in regard to the ranch? A. No.

Q. That was the last one?

A. That was the last one.

Q. Was Clarence Sadler out there at the ranch, so far as you know, on any occasion between 1925 and 1938?

A. Yes, I think when I was in Reno Clarence Sadler was out there.

Q. All you know about that is from hearsay, is that right? [309]

(Testimony of Mrs. Ethel Sadler.)

A. Well, Clarence Sadler called to see us at University Avenue.

Q. Do you remember about when that was?

A. Well, it was when I come down to take my daughter down to school at the University of Nevada.

Q. But can you give us the approximate year?

A. Oh, what year?

Q. Yes.

A. Oh, that was the first year—I would say that was in 1933.

Q. And he was on his way to the East, or the ranch, at that time? A. I don't know.

Q. He called at your place? A. Yes.

Q. You understood he was going on out East?

A. Well, I don't know if he went to the ranch after that or not.

Q. But you did understand he had been at the ranch or was going there, one of the two, is that right? A. Yes.

Q. After 1938 and down to the commencement of this action in 1944, was it a fact as to whether Clarence Sadler was out to the ranch at any time or not? Was Clarence Sadler out to the ranch any time after 1938 that you know of? A. No.

Q. You said something about a bunk house, is that the house that you were living in after some other house was destroyed?

A. Well, the home we lived in burned down.

Q. When was that fire? A. 1922.

Q. And was it then that you and your husband fixed up this bunk house as your home?

(Testimony of Mrs. Ethel Sadler.)

A. Yes, the bunk house. It was a stone building and we had to do a great deal of renovating on this stone building and we made three bedrooms out of the bunk house and we built two large rooms.

Q. That is on to the bunk house?

A. Yes, a living room and a great big kitchen.

Q. Do you know anything about the expense involved in the repair of that bunkhouse for a residence?

A. Well, it took plenty of money. The carpenters were paid there—they started about July to work there.

Q. Do you know anything about what it cost, or approximately what it cost?

A. Well, I know my husband had a life insurance policy that he used.

Q. How much money did he get out of that?

A. \$1800.

Q. What can you say as to whether all of that was employed in the work of rebuilding or repairing the bunkhouse? A. Yes.

Q. All of it? A. I would say all of it.

Q. Something was said in regard to the funeral of a brother of [311] yours. Was he the one named Tom? A. Tom Eccles was my brother.

Q. Do you remember about when that funeral was?

A. The funeral was in 1939. My brother was 39.

Q. Where was it held? A. The funeral?

Q. Yes. A. In Oakland, California.

Q. Were you there? A. I was.

(Testimony of Mrs. Ethel Sadler.)

Q. Was there any talk on that occasion in regard to the ranch conditions with any of Clarence Sadler's folks?

A. Well, there wasn't any talk in my presence and I thought the reason they didn't bring it up before me was because they were sympathizing with me when my brother was dead. He just died.

Q. Your statement, however, is that there was no talk on that subject in your presence?

A. No, there was not.

Q. Who was with you on that occasion?

A. Do you mean staying at Clarence's home?

Q. Yes, when you were visiting there after the funeral?

A. My sister Rebecca and Edgar and myself.

The Court: We will take our recess until 2:00 o'clock.

(Recess taken at 12:00 noon.) [312]

Afternoon Session, October 17, 1946, 2:00 P.M.

Appearances same as at morning session.

MRS. ETHEL SADLER

resumed the witness stand on further

Direct Examination

By Mr. Cooke:

Q. Mrs. Sadler, from about 1925 down to date, or down to the time of Alfred's death, what was the nature of the relations between the family, yourself

(Testimony of Mrs. Ethel Sadler.)

and Edgar, with Clarence and his family? Were they friendly or otherwise?

A. Well, I never liked to see Clarence come to my home and I never liked to go to his home. I thought it was too bad the brothers didn't get along better. I wasn't happy about it at all.

Q. Was there any other trouble besides the trouble about the ranch?

A. No, that was all the trouble.

Q. And that began about when?

A. Well, after that decree was signed in 1918.

Q. When did you first notice that there was any feeling of any kind as between Edgar and Clarence over that property?

A. Well, it was signed in Alfred and Edgar's name, that decree. I never knew that Clarence had anything to do with it.

Q. But you told us a while ago that the relations between you were at one time strained, that is right, is it? A. Yes.

Q. When did that first begin? [313]

A. Well, they came to visit in 1925 and I think Reba and I wrote a little after that but I would say after 1938 I never received a letter from them.

Q. You have told us about the conversation you heard between Edgar and Clarence, where Edgar made some statement that Clarence had no interest in the property in 1925? A. Yes.

Q. Was it about that time that this unfriendly condition arose or not?

A. Yes, I would say about that time.

(Testimony of Mrs. Ethel Sadler.)

Q. And did it get better or worse as time went on? A. Well, I would say worse.

Q. With regard to the exchange of letters did you, as people situated as you were ordinarily do, did you correspond frequently? A. No.

Q. Well, from 1925 to 1938, for instance, about how many letters a year would you say were exchanged between you and Clarence?

A. I don't remember that too well, but very few, I wouldn't say four a year.

Q. How about Alfred's family, were your letters more frequent there or not? A. Yes.

Mr. Thompson: We object to that—move the answer be stricken for the purpose of the objection.

The Court: It may be stricken. [314]

Mr. Thompson: We object on the ground it relates to transaction with a deceased person, which is prohibited under our statute.

The Court: It was addressed to the family.

Mr. Thompson: You are not referring to Alfred?

Mr. Cooke: Alfred's family I am referring to, but I will say Mrs. Alfred Sadler, about how frequently would you and she exchange letters?

A. I always answered Kathryn's letters. She wrote far more often.

Q. Now after 1938 when you told us that Clarence was out to the ranch and he and Edgar had another talk about Clarence's claimed interest in the ranch, was there any change in regard to the correspondence after that date as compared with

(Testimony of Mrs. Ethel Sadler.)

the correspondence before that date with Clarence's family?

A. When Clarence went back, he and this other man with him sent some nuts and I believe, to the best of my knowledge, that that might have been the last time we ever wrote to them.

Q. When would that be?

A. That would be after 1938.

Q. Shortly after or some considerable time after?

A. He sent the nuts when he went back.

Q. That would be shortly after then?

A. Yes.

Q. Since that time, as far as correspondence between you and [315] Clarence Sadler's family, that is the last one that you recall?

A. That is the last one I recall.

Q. Going back to the occasion in 1925 when Clarence and his wife were there, I think Clarence testified that they were there three days, as he recalled it. Do you know anything about the number of days that they actually stayed there?

A. I would say they came on July 18th and left on July 24th.

Q. That was the time when you had that flood out there?

A. Yes.

Q. Now in your husband's answer in this case, in Paragraph 1, subsection of paragraph (c), it is alleged among other things that you inherited some money?

A. Yes, sir.

Q. Which you invested in the property or in livestock out there?

A. Yes, sir, I did.

(Testimony of Mrs. Ethel Sadler.)

Q. You have read that allegation in your husband's answer? A. Yes.

Q. You are familiar with its contents?

A. Yes.

Q. How much money did you inherit on that occasion and from whom?

A. I inherited from my mother and it was either \$2500 or \$2600.

Q. What did you do with that money or any portion of it?

A. I helped to buy those cattle that we bought in 1931.

Q. How much money of yours that you received from this inheritance was applied to the purchase of the cattle? [316]

A. I bought some calves with it. It was all spent on the ranch, whatever it was.

Q. What I am particularly concerned with is the amount that went into the cattle?

A. About two thousand dollars, I would say.

Q. You received that from your mother's estate in what year? A. She died in 1929.

Q. And you invested it in these cattle in what year? A. 1931.

Q. How did you keep that money from 1929 to 1931?

A. Well, it took a little while to settle the estate. We didn't get it right away.

Q. I mean when did you actually get it from your mother? When was it actually handed to you?

A. Oh, I can't remember that.

(Testimony of Mrs. Ethel Sadler.)

Q. How long before you bought the cattle did you get that \$2600?

A. I had it a little time because I remember Edgar coming to the Legislature and I came with him and I had to have some clothes and I bought some then.

Q. Well, you had it some little time before you bought the cattle? A. Yes.

Q. From whom were these cattle purchased?

A. I think a man by the name of Mead, Mead & Company, I think.

Q. Was there any other cattle purchased at the same time, that is with funds contributed by any other member of the family? [317]

A. Well, my son lost his eye there and he got industrial insurance.

Q. That is Reinhold? A. Reinhold.

Q. Do you know how much, about how much, he got?

A. He spent, I believe it was about \$1600 of his money at that time on the cattle.

Q. He put the cattle over with yours?

A. Yes.

Q. And did your husband Edgar put up any money for the same bunch of cattle? A. Yes.

Q. Do you know anything about the total amount of cattle bought at that time?

A. 100 head, I think, 50 heifers and 50 calves, I believe.

Q. And they were all bought from this Mead?

A. Yes.

(Testimony of Mrs. Ethel Sadler.)

Q. Did you get a bill of sale?

A. Oh yes, we have the bill of sale.

Q. Have you got it?

A. We have it with us.

Q. Did you ever see the bill of sale?

A. Oh yes.

Q. I will show you a paper dated Battle Mountain, Nevada, July 28, 1930, and purporting to be signed R. M. Mead & Company by R. [318] M. Mead, Secretary and Manager, and ask if you will look at that and state if that is the bill of sale that you referred to a moment ago? A. It is.

Q. Was that delivered on or about the date that it bears? A. Yes.

Mr. Cooke: We offer it.

Mr. Thompson: We have no objection, your Honor.

The Court: It may be admitted in evidence as Defendant's Exhibit B.

Q. What was the brand on the cattle that you purchased at that time, if you know, Mrs. Sadler?

A. That we bought from those people?

Q. Yes, the so-called Mead purchase.

Mr. Thompson: It is in the bill of sale.

A. I believe it was a hat.

Q. Hat brand? A. Yes.

Q. Do you know where, what part of the body?

A. No, I don't know.

Q. This bill of sale says on the left thigh. Does that refresh your recollection?

A. No, it doesn't because I never paid too much attention.

(Testimony of Mrs. Ethel Sadler.)

Q. The bill of sale reads 102 cows branded a hat, also 41 calves, that would be 143 head altogether. Does that correspond [319] to your recollection as to the cattle you say were bought?

A. Oh yes sir, that is the correct number.

Q. You mentioned Reinhold Sadler and his contribution and purchase of a portion of these cattle. Do you know anything about how the cattle were branded after they were received from Mead?

A. Well, Reinhold's brand is my brother's old brand T E.

Q. That is Mr. Eccles that testified on the stand here? A. Yes.

Q. And Reinhold took over his brand?

A. I think he purchased it from him.

Q. And he branded his portion of the cattle T E?

A. He did.

Q. How were the cattle that you paid for branded? A. Two half circles.

Q. That is your husband's brand, your family brand, yours and your husband's? A. Yes.

Q. How soon after the purchase was that branding done?

A. Well, I can't tell you that. Soon after because after they buy cattle they vent them.

Q. And venting consists of what?

A. I believe the people you buy the cattle from have to be present to vent them from you.

Q. How soon after the purchase was the Sadler brand—by that I mean the interlocking half circles—brand, when was that put on [320] these cattle?

(Testimony of Mrs. Ethel Sadler.)

A. Well, we bought those cattle in haying time and I would say right in the fall.

Q. So if I understand you correctly, what cattle were not branded with the T E brand by Reinhold, were branded with this quarter circle interlocking?

A. Yes.

Q. What was done with the cattle after they were branded?

A. We had to feed them that winter and that was the hard winter in 1932 and I tell you everybody lost cattle that year. You didn't know if you would have any left when the winter was over. The winter started in November 15th.

Q. Did Edgar have any cattle on the ranch when he bought the Mead cattle? A. Yes.

Q. He had quite a number? A. Yes.

Q. Do you know approximately how many he had before he bought the Mead cattle?

A. It must have been over 200 head.

Q. Tell us about the Mead cattle he purchased and the T E cattle of Reinhold's, were they kept separate from Edgar's old bunch or not, or all thrown in together?

A. All thrown in together.

Q. So that there would be a matter of several hundred head of [321] old quarter circle cattle in there with these cattle that you got from Mead?

A. Yes.

Q. Now where does Reinhold Sadler live?

A. They have a house a little distance from ours.

Q. Do you know when that house was built?

(Testimony of Mrs. Ethel Sadler.)

A. Yes, I do.

Q. When?

A. Well, it was built when I was down here with Violet going to school.

Q. Yes, but some might not know when you were here with Violet.

A. I would say it was finished about 1937.

Q. Do you know anything about who paid for the construction of the building?

A. I do. My daughter-in-law taught school and my son had the stage.

Q. Your daughter-in-law?

A. Yes, Reinhold's wife.

Q. What is her name? A. Verna.

Q. And Reinhold was driving stage?

A. Yes.

Q. Do you know how much money Verna actually put into it?

A. She put the biggest portion into the house. She put all she made into the house. [322]

Q. Do you know what it cost, approximate cost for construction?

A. They figured about two thousand dollars.

Q. And Verna paid the major portion of that?

A. Yes.

Q. Who paid the other portion?

A. Well, Reinhold Sadler.

Q. From his earnings as a driver of the stage?

A. Yes.

Q. Where did he drive the stage?

A. From Eureka to our place.

(Testimony of Mrs. Ethel Sadler.)

Q. Is that a regular stage line?

A. Yes.

Q. Was he working on a salary at that time?

A. He got paid for driving the stage, yes.

Q. That is what I mean, he was working on a salary? A. Yes.

Q. And he and his wife, Verna, have resided in that house ever since? A. Yes.

Q. How far is that house from your house, you and Mr. Sadler?

A. Well, I wouldn't say it is—it wouldn't be a twentieth of a mile. Oh, no, it isn't that far either.

Q. Right close up? A. Yes.

Q. Where did Verna teach school? [323]

A. We had the Diamond School District there.

Q. Was that before she married or after she married?

A. She was teaching at our place when she married and she taught after.

Q. I show you Plaintiff's Exhibit No. 36. I wish you would look that over and state if you will whether you have seen that, or any portions of it, before and if so, under what circumstances. Did you ever see it before?

A. I can't tell, Mr. Cooke. I didn't pay too much attention.

Q. I call your attention——

A. We were trying, at one time we had to get a \$4200 loan. The bank was forcing us to sell what cattle we had. We were pretty well compelled—I

(Testimony of Mrs. Ethel Sadler.)

remember we had to do a lot of correspondence about that but I don't know——

Q. This letter——

A. My husband might be better able to answer that than I am.

Q. This paper contains a copy of letter from Mr. L. H. Harch to Edgar Sadler. On the bottom is Edgar's note about this note as follows: "You can see what they say about it. Can't borrow at that rate. Better give the property away." Does that refresh your recollection, having seen that, why your husband put the note upon the original and sent it on?

A. What year is that dated?

Q. That is November 22, 1933. The point is, if you remember Edgar putting any notation upon a letter of that sort, upon the [324] Hatch letter?

A. Well, Mr. Cooke, I was in Reno with Violet at that time.

Q. So you don't recall anything about that?

A. I don't.

Q. Now, calling your attention to Plaintiff's Exhibit 28, look that over and state if that is in your handwriting and under what circumstances you came to make it, if you made it at all?

A. That is my handwriting.

Q. When you say that is your handwriting, you are referring to the part on the Nevada State Legislature heading, Senate Chamber?

A. Yes.

Q. The other part, can you identify the writing?

A. That is Alfred's.

(Testimony of Mrs. Ethel Sadler.)

Q. Do you recall anything about making this or who you furnished it to or why it was furnished or anything about it?

A. I don't. I can't remember.

Q. Do you recall any discussion between yourself and your husband in regard to the matter just before sending that away, in connection with it?

Mr. Thompson: She can answer that yes or no.

Q. Do you recall having any talk with your husband about the subject matter about what appears in your Senate Chamber heading?

A. Right now I can't even remember that.

Q. And you don't recall having any talk with your husband about the subject matter at all? [325]

A. No, I can't remember.

Q. Mrs. Sadler, you refer to hard times out there and having to mortgage the property, etc. What was, so far as you know, the general situation, we will say from 1925 down to date, or down to the time this suit was commenced, with regard to financing the ranch and the ranch operations?

A. Mr. Cooke, I will say I never saw anything but hard times in my life at the Sadler ranch. These last few years it was a little better.

Q. What do you mean by hard times?

A. Had to borrow all the time, never out of debt. From the RAC there had to get commissioner's loan from the bank for \$4200. The bank was going to take the few cattle we had; I don't know whether first or second mortgage; commissioner's loan, had a great deal of trouble getting that; thought we would never get it, just sunk.

(Testimony of Mrs. Ethel Sadler.)

Q. Did you participate in the negotiation of these mortgages to any extent?

A. I certainly did in that commissioner's loan.

Q. How about the others? How many in all would you say were put on there from 1925 down to 1944?

A. It seemed to be nothing but mortgages. It was the RAC——

Q. The number I am asking about, approximate number. Have you any idea?

A. I can't tell you. [326]

Q. Did you join with your husband in signing?

A. Oh, I had to sign, yes.

Q. Did either you or your husband have income from any other source than the ranch, other than what you told us?

A. He was county commissioner and he was assemblyman, he was senator and then he drove stage, too, and I had the school, too, for just four months once, to finish a term.

Q. What did you do, did you teach school?

A. Well, that time I taught school, I surely remember that. It was just before the fire, when the house burned down.

Q. That was in 1922, wasn't it? A. Yes.

Q. And then you said your husband drove stage?

A. Well, we had the stage before Reinhold had it. Wallace Bailey had it, too.

Q. When was it that he drove stage?

A. When I married him he was driving stage.

(Testimony of Mrs. Ethel Sadler.)

Q. That is going too far back for the present purpose. Did he drive stage any time, we will say, after 1918?

A. Yes, I think so. Reinhold wouldn't be old enough at that time, I think, to have it.

Q. Edgar, your husband, had the stage before Reinhold took it over, is that right?

A. No, Mr. Barkine had it and Wallace got it and Edgar had it. Well, the railroad washed out in 1910. We drove the stage at [327] that time. The stage had to go from Palisade to Eureka and we drove——

Q. Mrs. Sadler, I am not inquiring about what happened prior to 1918. Did Edgar drive the stage at any time after 1918, would you say?

A. Well, I can't say for sure.

Q. How about his term as commissioner, can you state about when that was with reference to 1918? Was it before or after?

A. Yes, I would say he was commissioner after 1918.

Q. Do you know how long he was commissioner?

A. No, he could answer those questions better than I can.

Q. Doubtless, but I am trying to find out what you may know. Do you know anything about what salary he got?

A. \$50 a month and then they raised it.

Q. When you say "commissioner," you mean county commissioner of Eureka County?

A. Yes.

(Testimony of Mrs. Ethel Sadler.)

Q. Then you say he was in the assembly?

A. Yes.

Q. And he got the regular salary?

A. Yes.

Q. And he was in the senate? A. Yes.

Q. And he was in the senate and he got the regular salary there? How long was he in the senate? [328] A. Just four years.

Q. Was it two terms or after they made it one term?

A. Well, one term is four years for the senate.

Q. How many terms as assemblyman did he serve?

A. I would say two, that would be four years. That is he was elected. He was really assemblyman when I first married him. He served three times.

Q. This term of assemblyman here was after 1918? A. Yes.

Q. You haven't told us the year or years have you? Do you know about when it was he served as assemblyman?

A. I believe it was around—I know my daughter was in the eighth grade.

Mr. Thompson: If you know when it was, Mr. Cooke, we will stipulate.

Mr. Cooke: Well, I think it was 1930, as near as I can recall.

Q. When did you learn in any way for the first time that Clarence claimed to have this trust agreement, so-called, that is marked in this case Exhibit 8? You know what I am referring to, don't you?

(Testimony of Mrs. Ethel Sadler.)

A. Well, when the suit was started, that is the only time I ever knew of it, ever heard of it.

Q. From whom or how did you learn of it then?

A. Well, it came in that suit. [329]

Q. It came in the suit, what do you mean, came in the suit? A. When he started the lawsuit.

Q. Do you remember of seeing what purported to be a photostat copy of the document?

A. Well, I believe that is what we had.

Q. That was received from me, was it not?

A. Yes.

Q. You saw it after the commencement of the suit? A. Yes.

Q. That is the first thing you knew about it?

A. No, I think the sheriff brought it.

Q. Yes, but I am talking about the photostatic copy of the document. You didn't know anything about that? A. No.

Q. And you never saw that so-called trust agreement until the suit was commenced against Mr. Sadler? A. I never did.

Q. Do you know anything about insurance policies that your husband carried, taken out by him prior to 1918?

A. We had an insurance policy when we built the house. We had two insurance policies when I came to Reno here.

Q. Well, you collected on one policy, at least your husband did? A. Yes.

Q. And that was put into the house you testified?

A. Yes, that was. [330]

(Testimony of Mrs. Ethel Sadler.)

Q. And then you referred to two other policies?

A. I did.

Q. When you came into Reno—what date would that be?

A. That must have been 1933 when I came in.

Q. What about those policies? Did your husband get any money on them, cash them?

A. Yes.

Q. How much did he cash them for, do you know?

A. I know I wouldn't have been able to come to Reno without those policies, that's all.

Q. Do you know whether or not any of the money he obtained from the other policies, besides the one you have already mentioned, was used in the operation of the ranch and the up-keep of the ranch? You had some of that money for yourself, you say?

A. Yes, I had some here.

Q. It is alleged in the complaint one policy by the New York Life Insurance Company for \$3,000, that was cashed by Edgar Sadler in 1920, do you know anything about that?

A. Well, we had to use that on the house—1920—the house was burned down in 1922. Well, we used all the money we ever had on the ranch.

Q. What I am trying to find out, just in what particular method or manner any of this insurance money was invested, whether it was invested in the ranch itself or in the cattle?

A. Well, my husband will have to answer that.

(Testimony of Mrs. Ethel Sadler.)

Q. Do you know about a policy issued to your husband by the Kansas City Life Insurance Company for \$1800? A. Yes.

Q. Do you remember anything about when that was cashed?

A. No, that might have gone to help build that house.

Q. Then do you know about a policy in the sum of \$3,000 issued by the New York Life Insurance Company to your husband and cashed in 1933?

A. Yes.

Q. Do you know what was done with that money?

A. Well, I guess I had some of it to go to Reno.

Q. Well, beside some of it that you came to Reno on, do you know what happened to the balance?

A. My husband could answer that, Mr. Cooke, too.

Q. You mean you don't know what was done with it?

A. Well, I know I had some of it.

Mr. Cooke: That's all.

Cross-Examination

By Mr. Thompson:

Q. Mrs. Sadler, you testified about the conversation you overheard at the Diamond Ranch in the year 1938 when Clarence was there with another man deer hunting. A. Yes, sir.

Q. Do you recall what month that was?

A. It was October because the deer season was open. [332]

(Testimony of Mrs. Ethel Sadler.)

Q. You testified regarding purchase of some cattle, 102 cows and 41 calves, you thought it was in 1931?

A. Well, it was right after my mother's death, 1929. I wouldn't swear exactly to the year.

Q. I believe——

A. It might have been 1930. I wouldn't swear exactly to the year.

Q. The bill of sale was July 28, 1930. Would that be right, so far as you remember?

A. I know my mother's money was used there. That must have been. I will see if I can find this. Yes, I got September 20, 1930. I marked in my diary about what we paid for the cows and how much we owed.

Q. How much was the total purchase price of those cattle?

A. I don't have to answer that, do I?

Q. Well, I asked it.

A. Well, I put it: "Paid for cows \$7,232."

Q. Does that include the 102 cows and 41 calves, is that for all of them, or was something else paid for the cows? A. No, the cows and calves.

Q. They were all together for \$7,232?

A. Yes.

Q. Now you testified that some of the cattle were branded with Reinhold Sadler's brand, T E I believe? A. Yes.

Q. And that those were the cattle for which he paid \$1600, he contributed [333] \$1600 of his money? A. Yes.

(Testimony of Mrs. Ethel Sadler.)

Q. Do you know how many head of cattle were allotted to that \$1600 that Reinhold paid?

A. He had to borrow it.

Q. As I recall, you testified that you had about two thousand dollars?

A. I did. I had over two thousand dollars.

Q. That was the money you inherited?

A. Yes, I did.

Q. And Reinhold Sadler put in about \$1600?

A. Yes.

Q. Now Edgar Sadler also put in some money?

A. Yes.

Q. Do you know how much he contributed?

A. I do not.

Q. You don't remember? A. No.

Q. How old is Reinhold Sadler?

A. Thirty-seven—no, he will be 38 years October 27th.

Q. You have another son, Floyd?

A. I have.

Q. How old is he?

A. He is two years and four months younger than Reinhold.

Q. He is about 35? [334]

A. Thirty-six in March.

Q. Is Floyd married also?

A. He is married and has three children. He has a baby at the hospital now.

Q. When was Floyd married?

A. They have been married four years, I guess five years, February 14, 1947.

(Testimony of Mrs. Ethel Sadler.)

Q. And the two boys in your family lived on the Diamond Ranch all the time?

A. Yes; Floyd worked before he came to the ranch.

Q. And when did he work away from the ranch?

A. Well, he is here. I think we had better ask him that question.

Q. Well, do you know?

Mr. Cooke: If you know, answer it.

A. Well, I have to figure it out. I think it would be better for Floyd to answer that question.

Q. Has Reinhold Sadler been on the ranch all the time? A. Yes.

Q. Do you know about how long Floyd worked away from the ranch?

A. It was quite a number of years.

Q. You and your daughter, Violet, lived in Reno, Nevada, for four years? A. We did.

Q. That is while your daughter was going to high school? [335]

A. We went home in the summer.

Q. But during school session you were living in Reno?

A. Yes, went home at Christmas most of the time.

Q. Do you recall that in the late spring, or perhaps in June, of 1930, you visited Clarence and Reba Sadler at Berkeley, California, with Violet?

A. That I visited Clarence in 1930?

Q. Yes. A. With Violet?

Q. Well, I am not positive that Violet was with you, but you were there?

(Testimony of Mrs. Ethel Sadler.)

A. Violet was 16 years old in 1930; Violet is 26 years old now. That would be 16 years ago—she would be 10 years old. In what year did you say it was?

A. In 1930, in the late spring or possibly in June?

A. I did not visit Clarence, no. If that is what you mean—yes, I think I did take Violet after my mother's death and stayed at Virginia's home, my brother John Eccles' wife.

Q. Didn't you visit Clarence Sadler and his wife at that time?

A. Oh, I might have gone over there.

Q. Didn't you have a conversation with them at that time? A. Not that I can remember.

Q. Did you have a discussion at that time with Clarence Sadler regarding the Diamond Valley Ranch, in which Clarence Sadler asked you to get from Edgar Sadler a price at which he would be willing [336] to sell the ranch, so that the mortgage could be paid off and the money divided between the heirs of Reinhold Sadler? A. No.

Q. You didn't have that conversation?

A. No, I don't remember that at all.

Q. I show you Exhibit 41 for identification, Mrs. Sadler, that is in your handwriting, is it not?

A. That's my writing.

Q. Isn't that a letter that you wrote and mailed to Reba Sadler, Clarence Sadler's wife, in July, 1930? A. That is my writing, yes, sir.

(Testimony of Mrs. Ethel Sadler.)

Mr. Thompson: I offer Exhibit 41 for identification in evidence, your Honor.

Mr. Cooke: I note in the Exhibit down at the bottom a portion of it is marked apparently for special attention. That wasn't on the letter at the time?

Mr. Thompson: No, that was put on afterward. The two horizontal lines at the bottom of the first page on the left-hand side are not claimed to have been on the letter at the time.

Mr. Cooke: No objection.

The Court: It will be admitted in evidence as Plaintiff's Exhibit 41.

Mr. Thompson: Exhibit 41 is dated Eureka, Nevada, July 12, 1930: [337]

“Dear Reba. I think I had better write today before we are too busy haying. The men are on the first stack today. I would be quite happy if it was the last instead of the first.

“I was quite fortunate in getting good help in the kitchen this year. A Mr. & Mrs. Laird drove down from Eureka one day and asked if I needed help so I said ‘Yes’ and they came the next day. She has taught home economics for the past five years in the Eureka High School and received a salary of \$200 per month. It is quite a come down just to receive \$40. They are not employing many married women in the Nevada Schools this year so perhaps that has something to do with her working as she is this

(Testimony of Mrs. Ethel Sadler.)

summer. Anyway she is a real nice companion as well as a helper.

“Edgar said he was willing to sell any time he could receive \$65,000 for the ranch alone. He said the way ranchers are selling at the present time it is worth it.

“I didn’t enjoy my trip through the Feather River Canyon, was real disappointed in the scenery and the heat was so oppressive. Violet and I had to occupy an upper berth as all lower berths were taken. However, that didn’t bother me any—a very congenial crowd were on the train. [338]

“The folks were glad to see me back more so than I was to get back. I surely enjoyed every minute of my visit. One of the teachers that taught here is vacationing in the Hawaiian Islands and one in Europe. Katrina Jacobsen is also in the Islands.

“Mrs. Bailey only got as far as Elko on her way to visit Wallace. She fell going to the bath room and sprained her back and Edna came and took her back to Colstrip. Perhaps it’s better that she didn’t as Mary soon expects to go to Elko for the third addition to the family. Hale is only three in Dec. Mrs. Flynn is still confined to her bed; gets up a few hours a day. She is 78. Viola Mau is in Texas again taking up music. Quit nursing. With love from all to all. Ethel.”

(Testimony of Mrs. Ethel Sadler.)

Q. Mrs. Sadler, how many head of cattle bearing the brand J bar C are on the Diamond Ranch now? A. None that I know of.

Q. How many cattle bearing the two half circle brand are on the Diamond Ranch now?

A. You will have to ask that question of the men.

Q. You don't know?

A. I really don't know. You will have to ask the men.

Q. You haven't been keeping a record of the cattle purchased and sold? [339]

A. Well, I might have, but I wouldn't know right now. I could if I was home.

Mr. Thompson: That's all.

Re-Direct Examination

By Mr. Cooke:

Q. In that letter, Plaintiff's Exhibit 41, that you wrote to Reba Sadler on July 12, 1930, you know what letter I am referring to? A. Yes.

Q. You said there that you enjoyed your visit very much, or words to that effect. Whom did you visit with that you enjoyed?

A. Well, I visited with my sister-in-law, Mrs. Eccles. I might have gone over there to visit.

Q. The visit you are referring to, that wasn't a visit with Clarence Sadler's wife?

A. Oh, no, no.

Q. You testified on cross-examination in regard to your sons Reinhold and Floyd wasn't on the

(Testimony of Mrs. Ethel Sadler.)

ranch on certain occasions. What kind of work did they usually do there, real work or not? I mean, how did they work?

A. Why they would do all the work.

Q. Well, commencing when and quitting when? Put in a full day's work?

A. Well, I should say they did probably more. At the time labor was so scarce they had to put in a long day and did most of the [340] work themselves.

Q. Is that the way they worked from the time they were able to work, old enough to work on the ranch?

A. My poor oldest son started in right away. He just went two years to high school.

Q. That is Reinhold? A. Yes, Reinhold.

Q. And he worked on the ranch from that time on? A. He did.

Q. As you have described. Was that 8-hour shifts, or do you pay any attention to shifts?

A. Oh, we don't have such a thing, I wouldn't say, as an 8-hour shift.

Q. Were they paid wages or in what way did they live before they were married, while they were working on the place? What was the arrangement? Did they get wages from your husband or not?

A. Who was that?

Q. Either one, Reinhold or Floyd?

A. Well, Floyd went to school. When he was attending school in California we paid him wages when he hayed, to help go to school.

(Testimony of Mrs. Ethel Sadler.)

Q. But when he was living on the ranch outside the haying season, would he draw wages like other hired men or not? A. Oh, no.

Q. Did you pay Reinhold any wages at any time, haying or any other time? [341]

A. Oh, I guess he got spending money. He had to have something.

Q. I mean regular wages that you would pay the ordinary hired man? A. Oh, no.

Q. Now you told about the purchase of these Mead cattle and I understand you to say that they were divided equally between Reinhold Sadler and Edgar Sadler, is that right? A. Yes.

Q. You said that Reinhold had to borrow some money? A. Yes.

Q. How about you and your husband?

A. We had to borrow money, too.

Q. Do you remember where you made the borrow? A. Up at Eureka, at the bank.

Q. Do you remember how much you had to borrow? I mean, to buy those cattle?

A. I don't know.

Q. You had approximately \$3500, one half the \$7000 purchase price? A. Yes.

Q. Do you know about how much he had in cash at the time? A. I don't know.

Q. But he did make a borrow? A. Yes.

Q. In order to get that money? A. Yes.

Mr. Cooke: That's all.

Mr. Thompson: That's all. [342]

REINHOLD SADLER

a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. What is your full name, please?

A. Reinhold Sadler.

Q. You are the son of Edgar Sadler and Ethel Sadler?

A. Yes.

Q. Where do you reside, Mr. Sadler?

A. In Diamond Valley.

Q. How long have you resided there?

A. All my life.

Q. Born there, were you?

A. No, I was born at Ruby Hill. That is close to Eureka.

Q. How old were you when you moved to the ranch, if you know?

A. I wouldn't know.

Q. After you got of school age, I suppose you attended school?

A. Yes, I went two years to high school.

Q. Where?

A. At the ranch. We had high school at the ranch.

Q. And during that time what, if any, work did you perform on the ranch? When you were going to school, did you do any work there?

A. In haying time and did quite a lot of riding when I was in high school.

Q. Ride for cattle? [343]

A. Yes.

(Testimony of Reinhold Sadler.)

Q. And during haying time you worked in the hay field? A. Yes.

Q. Did you get any wages for that or was that part of your ordinary duties as a son?

A. No, I never got any wages.

Q. After you got through with school what did you do, how did you spend your time?

A. I went to work on the ranch, doing regular ranch work.

Q. That would be about what age?

A. Oh, approximately 15, I would say, or 16.

Q. Doing regular ranch work like a hired man at that age? A. Yes.

Q. And you continued that how long, down to the present? A. Until about a week ago.

Mr. Thompson: Pardon?

A. Until the present.

Q. How old are you?

A. I will be 38 the 27th of October, in a few days.

Q. Were you on or about the ranch in 1918?

A. Yes.

Q. Do you remember anything about what took place at that time? A. No, I don't.

Q. Something has been said about your driving a stage. Do you remember about being employed in that way? [344]

A. Yes, I drove the state line for four years.

Q. That stage line was from what place to what place? A. From Eureka to the ranch.

(Testimony of Reinhold Sadler.)

Q. And you got a salary for driving of the stage? A. Yes, I got about \$70 a month.

Q. Who owned the stage line?

A. Well, it was a government mail contract, two days a week.

Q. What did you do with your money, this \$70 a month that you earned?

A. Well, used part of it for the expenses on the stage line, some for my own living.

Q. You weren't paying any of the expenses of the stage line, were you?

A. Well, I had a contract; yes, I had to pay the cost.

Q. You were operating the vehicle?

A. Yes, sir.

Q. And you got \$70 a month for your services and the vehicle that you used? A. Yes.

Q. Do you remember how much you earned or obtained from the entire period of your stage driving experience? A. No, I don't.

Q. Well, you got the \$70 a month, was that the year around? A. Yes.

Q. What other employment, if any, away from the ranch did you [345] engage in?

A. I worked, I fed cows for three winters for another party, along with our own cattle.

Q. Who was that?

A. Their names were Handley Brothers.

Q. You were paid a wage from the Handley people for your services, were you? A. Yes.

(Testimony of Reinhold Sadler.)

Q. That was over what period, how long?

A. Well, that would be '28, '29, and '30.

Q. How much of a wage did you get from the Handley people for your work there?

A. Oh, I believe one winter it was \$50 a month and the next winter it was \$75.

Q. Just in the winter time?

A. Just for a few months while the cattle was there.

Q. What other work, if any, did you do away from the ranch on wages?

A. I believe that is about all, Mr. Cooke.

Q. Ever do any mining? A. No.

Q. In the answer of your father, Edgar Sadler, it is alleged in substance that prior to the year 1930 you acquired and separately owned some 40 or 50 head of cows and calves. What is the fact about that? [346]

A. I got these cows in 1930.

Q. Was that the first cows or cattle you acquired, in 1930?

A. Oh, I had a few head, yes.

Q. How many head do you mean by a few head?

A. Oh, I would say probably 25 or 30.

Q. How did you get those?

A. Well, some were given to me. They were leppy calves.

Q. Just what is that, for the record?

A. That is a calf without its mother, a calf with no mother. I believe John Eccles gave me one calf. Henderson Bros. gave me three.

Q. Some of these 25 or 30 you had acquired prior to 1930, is that right? A. Yes.

(Testimony of Reinhold Sadler.)

Q. Is that all you had down to the time you made a purchase in 1930?

A. Well, there were a few odd calves afterwards and they grew up or increased.

Q. When did you first acquire any calves from these folks prior to 1930?

A. When I was 17 years old was probably the first occasion.

Q. Can you tell us about what year that would be?

Mr. Thompson: 1926.

Q. Is that right, 1926?

A. Yes, approximately about that time. [347]

Q. You first acquired any? A. Yes.

Q. And then you continued getting those calves that you told us about, so that you had about how many in that way in 1930?

A. Oh, I approximately figured around 30 or 35 head, something like that.

Q. Then in 1930 did you acquire any additional cows or calves? A. Yes, I bought 50 head.

Q. From whom did you buy the 50 head?

A. They were bought from Mead.

Q. Is that the same transaction that your mother has testified about? A. Yes.

Q. And what was your brand, or did you have a brand? A. I had a T E brand.

Q. And these 50 head of stock that you got during that time, were they branded after you got them? A. I branded them after I got them.

Q. With the T E brand? A. Yes.

(Testimony of Reinhold Sadler.)

Q. And upon what part of the body was the brand put? A. That is on the left hip.

Q. Did you have that brand registered at any time? A. Yes. [348]

Q. Where?

A. In the agricultural office, State Board Stock, I believe it is called.

Q. What did you do with those cattle that you purchased in connection with this Mead transaction? A. I kept them there on the ranch.

Q. Were they run together with your father's cattle or separately?

A. Yes, they are all run together.

Q. Aside from the brand they were treated just the same as his cattle, is that right? A. Yes.

Q. When did you first learn of the existence of the paper that Clarence claims is a trust agreement, marked Exhibit 8 in this case?

A. In April, after Alfred's death.

Q. That would be 1944? A. Yes.

Q. And at that time in what way did you learn of it?

A. Mr. Kearney informed me there was such a paper.

Q. Wm. M. Kearney, the lawyer?

A. Yes.

Q. When did you first see it or see a copy of it?

A. When you mailed it out to us.

Q. That was after the suit had commenced, this suit, I mean? [349] A. Yes.

(Testimony of Reinhold Sadler.)

Q. Did you hear of such a paper being discussed or mentioned by Clarence Sadler or by your father or by anybody? A. No, I never had.

Q. Prior to that time? A. No.

Q. Now with reference to the period intermediate to the year 1933 and 1937, did you make any investment of your own money, or your wife's money, in the ranch property?

A. Well, my wife taught school there because we weren't getting any money from the ranch. We had to have a little to live on. She built our house.

Q. She, you mean your wife? A. Yes.

Q. And this was all money that she had earned teaching school? A. Yes.

Q. Was that prior or after you married?

A. That was after I married.

Q. She taught after she was married to help out? A. Yes.

Q. Do you know how much money she put in, as you describe it?

A. Well, I would say approximately most all of it.

Q. What is all of it?

A. All of the price of the house.

Q. What did the house cost? [350]

A. Oh, I would say two thousand dollars.

Q. And she put in all, or approximately all, of it? Did you put in any yourself?

A. Well, I didn't have very much coming.

Q. Did anybody else put any money in the house beside your wife? A. No.

(Testimony of Reinhold Sadler.)

Q. Then she put it all in, didn't she?

A. Yes.

Q. And the cost you testified was about two thousand dollars?

A. Yes.

Q. Have you and she resided in that house since?

A. Yes.

Q. That house, as I understand it, is quite close to the house where your father and mother live?

A. Yes.

Q. When did you build that house, you and your wife, when was that done?

A. I believe it was finished in 1937.

Q. In 1938 were you on the ranch on the occasion when your uncle Clarence Sadler drove down?

A. Yes.

Q. And were you living in this house at that time?

A. Yes.

Q. Did you meet Clarence Sadler on that occasion?

A. Oh, yes. [351]

Q. Do you know how long he remained there then?

A. I believe it was a few days.

Q. Do you know who was with him, or any one?

A. Well, there was a man with him. I wouldn't know his name.

Q. You say Clarence was there a few days. What do you mean by a few days?

A. Three, I think.

Q. Were you present at any conversation between him and your father in regard to the ranch?

A. No.

Q. You were living in your own house?

A. Yes.

(Testimony of Reinhold Sadler.)

Q. Do you know anything about your brother Floyd having purchased cattle and put them in with the balance of the stock on this ranch?

A. No, he never purchased any.

The Court: This might be a good time to take our afternoon recess. We will be in recess about 10 or 15 minutes.

(Recess taken at 3:30 p.m.)

3:45 P.M.

REINHOLD SADLER

resumed the witness stand on further direct examination by Mr. Cooke.

Q. I asked you just before the recess if you knew anything about [352] your brother Floyd purchasing any cattle and putting them on the ranch and you said he didn't purchase any. Did he have any cattle?

A. No, he got some from my father for some of the money he sent back. Then I gave him 12 head of mine.

Q. For money he sent back, what do you mean by that?

A. Well, he sent quite a little home when he was working.

Q. Where was he working?

A. For the Geological Survey in Santa Ana.

Q. Do you know about how long he was working?

A. I believe about four years approximately.

(Testimony of Reinhold Sadler.)

Q. During what year was this, about when?

A. From 1930. He came home in 1937.

Q. He got, as you testified, a number of cattle from your father for money he sent home and then you let him have 12 head? A. Yes.

Q. How many head altogether did he have in say 1937?

A. Oh, I would say approximately about 40 head.

Q. And do you know anything about how those cattle were branded that were turned over to him?

A. They were branded with F-3.

Mr. Thompson: The 3 attached on the tail of the F? A. Yes.

Q. And underneath it? A. Yes.

Q. On what part of the critter was that? [353]

A. On the left hip.

Q. Whose brand was that? A. His.

Q. But what brand did those cattle have before they were turned over to him, do you know?

A. Twelve had mine and the others had my father's.

Q. Yours was T E brand? A. Yes.

Q. And your father's was two half circles?

A. Two half circles.

Q. What did Floyd do with these 40 odd head of cattle that he got at that time?

A. He kept them on the ranch there.

Q. He kept them on the ranch, where they ran with all the other cattle, yours and your father's?

A. Yes.

(Testimony of Reinhold Sadler.)

Q. At that time what, if anything, do you know about arrangement or agreement between yourself, your father and Floyd as to having an interest in the business?

A. Well, when he came back there we gave him one-fifth interest.

Q. When he came back that is from this work?

A. Yes.

Q. When he came back did he stay on the ranch then and continue at the ranch?

A. Yes. [354]

Q. And it was agreed between you that he was to have one-fifth interest? A. Yes.

Q. Was that arrangement changed later on?

A. Yes, he is an equal partner.

Q. When was that arrangement made?

A. When he was married.

Q. When was he married?

A. I believe in '41.

Q. And that has continued down to the present time? A. Yes.

Q. So that, according to your testimony, I take it there is an equal partnership between yourself and your father and Floyd? A. Yes.

Q. Covering all of the property pertaining to the ranch, the livestock and equipment, etc.?

A. Yes.

Q. It is alleged in this paragraph, subdivision (f) of the answer, that Floyd Sadler put in about two thousand dollars after 1937, put in about two

(Testimony of Reinhold Sadler.)

thousand dollars to help keep the ranching business going. Do you know anything about that?

A. Yes, I know he sent money home. The exact amount I don't know.

Q. Now from 1937 to 1940, that was during the time that Floyd was working for the Biological Survey? [355]

A. It was before 1937.

Q. What was he doing from 1937 to 1940?

A. He was working on the ranch.

Q. Do you know whether he received any share of the profits or proceeds of the business or his living or the like during that time?

A. Well, he had to have a little to live on.

Q. From 1937 to 1940?

A. There were no profits. All the profits went to the bank.

Q. During the time that you were interested in the ranch and its operation and livestock upon it, etc., do you know anything about the financing, what was required to be done there and how it was done, receiving money from time to time, and so on?

A. Oh, yes, I have signed every mortgage since 1932 on the cattle.

Q. You say every mortgage, about how many mortgages do you mean?

A. The first one was on the cattle when we bought them in 1930.

Q. And how many altogether, we will say, since that time?

A. There was one to the bank, Farmers & Merchants, three, and two of those were to be renewed every year.

(Testimony of Reinhold Sadler.)

Q. Were they renewed? A. Yes.

Q. Why did you give all these mortgages and renew them, etc., why was that necessary?

A. Well, they just loaned money for one year and they have to [356] be renewed to run the ranch.

Q. Did you have any difficulty in making the ranch pay, keep up?

A. Well, I believe it went, the first mortgage was ten thousand dollars, to approximately twenty-six thousand on the ranch.

Q. Well, this ten thousand dollar mortgage that you mention, what time do you refer to that that was on?

A. That was in 1930, I believe.

Q. In 1930 there was a mortgage of approximately ten thousand dollars against the ranch then?

Mr. Thompson: The cattle?

Q. The ranch and the cattle or just the cattle?

A. Just the cattle.

Q. And that was increased from time to time by renewal mortgage and the like until you got up to twenty-six thousand dollars?

A. I think twenty-six thousand was the highest.

Q. What year does that refer to?

A. I imagine that might have been 1937, approximately 1937.

Q. And from 1937 on was that reduced or increased? A. It was reduced.

Q. There is a mortgage on the ranch at the present time, isn't there?

A. Not on the cattle.

Q. I say on the ranch? A. Yes.

(Testimony of Reinhold Sadler.)

Q. Do you know how much that is? [357]

A. Approximately twelve thousand.

Q. And to whom is that?

A. Federal Land Bank.

Q. Is it overdue or not?

A. What do you mean by overdue?

Q. Well, is it matured, payable in total?

A. Oh, no, it was a 30-year mortgage, 35 years, something like that.

Q. So it has quite a long time yet to run?

A. Yes.

Q. From the time that you were able to do a man's work on or about the ranch, what is the fact as to whether you put in your time on the ranch or not? A. Will you repeat that, Mr. Cooke?

Q. When you started in working on the ranch there, doing a man's work, for instance, since that time on you have been on the ranch right along, have you not?

A. Yes, I have been there all the time.

Q. Now how much of your time, the working hours of the day, did you spend working? I want to know something about how you operated and what you did out there.

A. Oh, well, in the summer time, when we were haying, it runs from four until eight at night.

Q. That is during haying. You put in on the field from four until eight? [358]

A. Well, it isn't all in the field; do a little irrigation before breakfast and haying all day, a little more irrigating after supper.

(Testimony of Reinhold Sadler.)

Q. How long a time do you call the haying season, how many weeks or months?

A. Well, ours run from 30 to 45 days now and before it used to run around 70.

Q. Your cattle were out on the range, were they, in the spring, summer and fall? A. Yes.

Q. In the wintertime what did you do with them?

A. We feed the cattle in winter. Those days are not quite so long. You get up at daylight and when you get through feeding, you can go home.

Q. Do you have any riding to do on the ranch?

A. Oh, yes.

Q. Who does that?

A. I do most of the riding.

Q. That covers what period of the year?

A. Oh, there is about, I would say, a month or six weeks, something like that.

Q. In the fall? A. Yes.

Q. When do you do your branding?

A. In the fall. [359]

Q. And during this summer time, after Floyd got back, what did he do on the ranch in the way of work I mean?

A. Well, regular ranch work. He runs the tractor, the plowing and all the dragging, runs the mowing machine and helps feed the stock.

Q. Does he do any riding?

A. Oh, yes, he has ridden times when I couldn't go out, had to help around the ranch. Sometimes he rides with me.

(Testimony of Reinhold Sadler.)

Q. Haying, the same as you?

A. He drives the plow.

Q. Your mother mentioned you had an accident to your eye and collected indemnity, what about that?

A. Yes, I lost the sight of my right eye.

Q. How did that happen?

A. A piece of steel from a crowbar.

Q. That wasn't in mining? A. No.

Q. That is why I asked you that question about mining. And you collected how much from that?

A. I believe about, I am not quite sure, but I believe the first check was \$1444 and I believe it was four or five months that they allowed me \$75.

Q. The aggregate would then be about what?

A. Well, about 17 or 18 hundred dollars.

Q. Is that through the State Industrial Commission? [360] A. Yes.

Q. And with reference to that 16 or 17 or 18 hundred dollars, whatever it was, what did you do with that?

A. I put it in to buy these 50 head of cattle.

Q. That is this Mead transaction you spoke about? A. Yes.

Q. You testified as to the time when Floyd was taken in as a partner on one-fifth interest and then later on full one-third interest. When did you become a partner in the cattle operation?

A. When I bought these cattle.

Q. That was in 1930? A. Yes.

Q. And was that an equal partner or what?

A. Yes, equal.

(Testimony of Reinhold Sadler.)

Q. As far as those cattle were concerned?

A. Yes.

Q. Your father had other cattle beside that, didn't he? A. Yes.

Q. Well, is it true then that when Floyd came in for a one-third interest in the entire ranch and cattle and business that you also had one-third interest? A. Yes.

Q. Does that mean all of the cattle?

A. Well, it is all the profits.

Q. Your father had cattle there before you bought these Mead [361] cattle, didn't he?

A. Yes.

Q. Were those cattle thrown in to the partnership? A. Oh, yes.

Q. And you and Floyd and your father are equal partners in all cattle out there now?

A. No, we are just equal partners in all the profits derived from the cattle.

Q. Then is it true that your father owns his cattle individually, you own your cattle individually with your brand, and Floyd the same?

A. Yes.

Q. You have the individual brand and cattle, but so far as profits are concerned, that is all put in one bag and divided up in thirds?

A. Yes.

Q. Do you know how many cattle are on the ranch at the present time altogether?

A. I believe there are 638.

(Testimony of Reinhold Sadler.)

Q. Belonging to your father, yourself and Floyd in the manner you have already stated?

A. Yes.

Q. And out of those 638 how many head belongs to you?

A. I really couldn't say, Mr. Cooke. I haven't counted them since last winter. I can tell how many were there last winter. [362]

Q. And the same is true in regard to Floyd?

A. Yes, and same would be true of my father.

Mr. Cooke: I think that is all.

Cross-Examination

By Mr. Thompson:

Q. Well, how many were there last winter, Mr. Sadler?

A. I believe 657 head was turned out.

Q. Were those cows or steers?

A. They were mixed.

Q. 657? A. Yes.

Q. That would be along in November and December?

A. That was January count—no, that was the spring count, when they were turned out.

Q. When would that be?

A. That would be April.

Q. How many calves were there in addition to the 657?

A. That is everything. That is when they were turned out and branded.

Q. That includes them all, is that right?

A. Yes.

(Testimony of Reinhold Sadler.)

Q. How many of those 657 head bore your brand, this T E?

A. I believe it is around 225.

Q. That is cows, calves and steers, is that right?

A. Yes. [363]

Q. And how many of the two half circle brand?

A. I would say around 300, more or less.

Q. How many with the F 3 brand?

A. I believe there was around 100.

Q. Now you are about 32 short.

A. Well, I said 300 more or less. I knew how many was branded with F 3.

Q. I see. You had 225 T E, about 100 F 3, and the rest is the half circle?

A. Yes, the rest is half circle.

Q. That would be about 332. How many calves, do you remember, have been born since the cows were turned out in the spring?

A. Oh, probably 150.

Q. Now when you round the cattle up for branding every year there is a calf running with a cow with the T E brand, you brand that calf a T E brand?

A. Yes.

Q. And if there is a calf running with a cow with the half circle brand, you brand that with the two half circles, and the same as to the F 3 brand?

A. Yes.

Q. And that has been the practice continuously since you first got some cattle in 1926 or thereabouts?

A. Yes.

(Testimony of Reinhold Sadler.)

Q. And also it has been the practice since your brother Floyd [364] first got some cattle and started to use his own brand? A. Yes.

Mr. Thompson: That's all.

MR. FLOYD SADLER

a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. Your name is Floyd Sadler? A. Yes.

Q. You are a brother of Reinhold Sadler, who was just on the stand? A. Yes.

Q. And the son of Edgar and Ethel Sadler?

A. Yes.

Q. Where do you reside at the present time?

A. At the Diamond Valley Ranch.

Q. Sometimes called the Sadler Ranch?

A. Yes.

Q. How long have you resided there?

A. Well, all of my life with the exception of the time I was going to school and working.

Q. Were you born there?

A. I was born, I believe, in Eureka and went back to the ranch right afterwards.

Q. And you spent some time away from the ranch in school? A. Yes. [365]

Q. How much time was that and about when?

A. I went to school for two years in the Oakland

(Testimony of Floyd Sadler.)

high school and then I went for three years to the Oakland College.

Q. That would be five years in all?

A. Yes.

Q. What years?

A. I finished college in 1932 and I went in 1931 and 1930. In 1929 I stayed on the ranch. In 1928 and 1927 I was in high school in Oakland. That is, for the term.

Q. And then after you got through your schooling, what did you do?

A. Well, I came back to the ranch and stayed for a few months.

Q. Then what?

A. And then I went to work for the General Land Office.

Q. In what capacity?

A. Well, I started out as a flagman and I worked as a flagman for approximately a month and a half and I was advanced to a chain man and worked as a chain man for approximately, oh, three and a half months, and then I received a temporary appointment as transit man.

Q. What is the total length of your connection with the Land Office?

A. I believe approximately two years and a half.

Q. After you got done with that job, what did you do?

A. Well, I was an engineer with the Division of Grazing for approximately six months, something like that. [366]

(Testimony of Floyd Sadler.)

Q. Where were you stationed at?

A. DV 20. That was a camp on the ranch at that time.

Q. At the Sadler ranch? A. Yes.

Q. Where did you live?

A. I lived at the camp.

Q. What I am trying to get, without going into too much detail, Mr. Sadler, about how much time did you spend away on your several jobs?

A. About 4½ or 5 years.

Q. And during that time you earned a reasonable salary, I assume? A. I did.

Q. How much?

A. Well, it varied. Well, I could name them all, but I was getting most of the time \$1800 plus, two thousand dollars a year, plus living expenses.

Q. You were not married at that time?

A. No.

Q. What did you do with your money, what you didn't have to spend for yourself?

A. I sent most of it home.

Q. For what purpose?

A. Well, they were having quite a little trouble getting the ranch going and I would send this money home and they would use it for various purposes around the ranch. [367]

Q. You say "they," who?

A. My father and mother.

Q. Have you any idea the amount that you sent home that way?

A. Well, I have a rough estimate. Around two thousand dollars, 1800 or two thousand dollars.

(Testimony of Floyd Sadler.)

Q. You sent back at various times during this 4½ or 5 year period? A. Yes.

Q. And that would be the years——

A. 1932 to 1937.

Q. Then after you got done with your job with the government, you returned home to the ranch?

A. Yes.

Q. What do you do there?

A. Well, my brother especially wanted me to stay on the ranch and help him out, so I returned to the ranch and worked on the ranch.

Q. What kind of work?

A. General ranch work, everything that had to be done.

Q. Was your time fully occupied or only partially occupied? A. It was fully occupied.

Q. With respect to the hours per day, what was it?

A. Well, it depends. In the wintertime I don't believe we work over possibly eight hours, but in the spring and summer and fall [368] we put in a full day's work, 10 hours.

Q. In the wintertime just what work is there on the ranch to do?

A. Well, it is feeding cattle and then there is riding in the winter too, taking care of the calves.

Q. And is that the way you occupied your time from the time you got back in 1937, is that right?

A. Yes.

(Testimony of Floyd Sadler.)

Q. From that time on that is the way you occupied your time?

A. Yes. There would be a few days, you know—I am a licensed surveyor and some of the near ranches around there wanted me to go out and do a little surveying for them and I would do it, but the greater portion of that time was on the ranch.

Q. Did you acquire any cattle during that time, did you get any cattle from anybody?

A. Well, in 1937 when I came back on the ranch, my father said he would, for this two thousand dollars that I had sent in at various times, he would give me 30 head of heifers and my brother said he would give me 12 head of cows that he had. They were old cows.

Q. That made about 42 head that you had in 1937? A. Yes.

Q. And was there any change made in the branding of those cattle at that time?

A. Yes, I branded them all with an F hanging 3.

Q. And that is your brand? [369]

Q. You have it registered? A. Yes.

Q. And what did you do with the cattle with this F hanging 3 brand?

A. I ran them in conjunction with my father. From 1937 until 1940 I didn't take any profits from these cattle. I put it back into the ranch. I had enough money saved up for my living expenses during that time so I let all the profits of the cattle go back into the ranch.

Q. Why was that?

A. Well, they gave me the one-fifth interest in

(Testimony of Floyd Sadler.)

the profits and I thought I would make a little contribution.

Q. To equalize things?

A. Yes, equalize things up.

Q. Did you know then, or do you know now, whether there were any profits during that period?

A. There were profits. All the profits, outside of living expenses and ranch up-keep, was applied on these various cattle mortgages.

Q. In the answer of your father, Paragraph F, page 8, the profits or proceeds that you should have received, if you wanted to take them, is alleged to amount to about \$1500 a year, is that right or not?

A. That would be about approximately right.

Q. But you didn't get them? [370]

A. No, I never took any profits.

Q. That is for that period. Then you started out with a partnership, you took one-fifth interest, is that right? A. Yes.

A. Later on that was increased? A. Yes.

Q. When was that increased?

A. When I was married.

Q. Well, what year?

A. That was February 12, 1942.

Q. That was increased to what?

A. That was increased to one-third interest, equal.

Q. Equal one-third interest in what?

A. In the profits of the business.

Q. But the cattle, with their respective brands, were kept separate, so far as the brand was concerned? A. Yes.

(Testimony of Floyd Sadler.)

Q. They were not thrown into this pot that was divided up equally? A. No.

Q. And you have at the present time about how many, do you know?

A. Right at the present time I wouldn't know exactly. I could tell you I had 96 head in January count last year, that was at the beginning of the year, and I believe there were possibly 12 calves that I branded in the spring. I wouldn't be sure of the [371] number of calves I branded last spring.

Q. It was in January that you had this 96 count?

A. Yes, and then there would be calves during the summer.

Q. That count in January, what does that include, cows and calves?

A. Whatever there was branded. We count up there all the cattle that are branded.

Q. How old does a calf have to be before you brand it?

A. It all depends on when we get around to branding it, but the oldest a calf is is from June to October.

Q. Now the figures you have given of the 96 in January and then you branded another 12 head of calves during the spring? A. Yes.

Q. And there would be some more since that time?

A. Oh yes, there would be more during the summer, but I haven't any idea how many there would be.

(Testimony of Floyd Sadler.)

Q. Well, basing your answer upon your experience with the cattle, couldn't you give us an estimate what there would be?

A. Well, there ought to be approximately 20 to 25 calves.

Q. Would that include the 12 you already told us about?

A. No, that would be unbranded calves.

Q. So your total now estimated as you have would amount to the 96 head plus the 12 calves that were branded last spring and plus about 25 head additional?

A. Yes, 25 head. [372]

Q. Do you know how many cattle your brother has?

A. Approximately, yes.

Q. Tell us about it.

A. Well, he has something over—about 225 head, I would say, and the increase.

Q. On somewhat the same basis as you gave?

A. Yes.

Q. And all the rest of the cattle out there belong to your father, is that right?

A. Yes.

Q. Are anybody else's cattle mixed up with these Sadler bunch?

A. Well, there are always a few strays that we hold in the field for our neighbors. No, I wouldn't say that there is.

Q. That is your range there, is it?

A. It is our range, but there are also other ranches that run cattle on the same range. They run in common and our cattle stray over to their ranch and they hold for us and vice versa.

(Testimony of Floyd Sadler.)

Q. Where do you live, what house building at the ranch do you live in?

A. Well, I live in the main ranch house, you might say. That is the house, the old bunk house that was converted into a ranch house.

Q. Do you know anything about the proceeding of converting that into a residence?

A. Well, I was there at the time it was built, yes. [373]

Q. Do you know who built it?

A. Well, my father built it, had a carpenter.

Q. Do you know where he got the money to build it? A. Well, I heard——

Q. That is just hearsay to you?

A. Well, I heard my father say it was lucky he got an insurance policy then or they couldn't have built the house.

Q. That is all you know about the money?

A. That is all I know about it.

Q. What was the probable cost, if you know, of building that house?

A. I would estimate around \$3500. That would be just an estimate on my part.

Q. Have you had any occasion to do any figuring on it, to familiarize yourself with the matter of the expense?

A. No, that would be just an estimate on my part. I did a little estimating for the Biological Survey on the value of houses and property that they were acquiring for duck refuges and that would be the only way I base my estimate.

(Testimony of Floyd Sadler.)

Q. You have had some experience?

A. Yes.

Q. Did you do any work on this yourself?

A. Not on the house. I repaired it afterwards, but I was too young to do very much carpentering.

Q. That was in 1922? [374] A. Yes.

Q. Then when you were married, you and your wife took up your residence in that same house?

A. Yes.

Q. Were you living in that house in 1938?

A. Yes.

Q. Going back for a moment when you acquired the interest in these cattle, as you have described, did you know anything about your Uncle Clarence Sadler making any claim to the ranch or any part of it or the cattle or any part of it?

A. I did not.

Q. When did you first learn that he was making a claim?

A. Well, the first time I knew that he was making a claim I believe was in 1938.

Q. And under what circumstances did that occur?

A. That was when he was out there on this hunting trip.

Q. Go on and tell us what you know about it and what took place.

A. Well, as I recall the instance, Clarence and this person—I heard previous testimony his name was Casto, I didn't remember the name, but his name was Casto—came over from Plummer's. I

(Testimony of Floyd Sadler.)

believe it was right after dinner, and they came to the ranch and that night, that same night that they came, I believe we did go out in the fields for a while and when we came back in Clarence went in the house and I stayed outside talking to this other man, Castro, and in a few minutes he went over to my brother's house. [375] He was sleeping at my brother's house and Clarence was sleeping at our house, so he went over to the other house and I went into the dining room or living room of our house and my father and Clarence were in this room engaged in a conversation. Clarence was doing most of the talking. It had something to do about selling the ranch, and I believe he was saying that he just came back from Los Angeles——

Q. Who do you mean?

A. Clarence just came back from Los Angeles, talking about millionaires down there and it might be a good time to sell the ranch and my father was rather excited and he was standing up in the center of the floor, walking back and forth, and there were two couches in the room and Clarence was sitting on one couch and I went over and sat down on the other couch and my mother was coming in there during the time. She was preparing supper, in the late afternoon, and well, my father was kind of excited and he kind of waited for Clarence to break his conversation, then he said that Clarence didn't have a God damn thing to do with the ranch and walked out of the room and my mother also walked out and Clarence and I sat there and began

(Testimony of Floyd Sadler.)

talking of other matters. That is all I remember of this conversation.

Q. Well, do you remember a little more particularly than you have already stated what Clarence said immediately preceding your father's statement to him that you just stated, that he didn't have any interest in it? [376]

A. Well, he said we should sell the ranch at that time.

Q. That is your Uncle Clarence said that?

A. My Uncle Clarence said that. While I was in there I don't believe my father made any other statement.

Q. They had been talking, I take it, before you came in?

A. Yes, I interrupted the conversation.

Q. And after your father made that statement that you have just testified about he left the room?

A. Yes, he walked out in the kitchen.

Q. But you and your uncle remained in there?

A. Yes, we were in there.

Q. How long did your Uncle Clarence remain at the ranch after this incident?

A. I believe three days.

Q. What was he doing during those three days?

A. Well, we were hunting deer and we went down to the fields. We went down to a place we call it John's field, and tried to get a few ducks.

Q. What I am trying to find out, how did he occupy his time during these three days?

A. Mostly hunting.

(Testimony of Floyd Sadler.)

Q. Hunting ducks, geese, or deer?

A. Deer. He didn't do very much hunting deer, but I think we went out a couple of times.

Q. Did you go out with him? [377]

A. Yes, I went out a couple of times.

Q. The matter of the ranch or the sale or disposition or ownership, did that come up at all between you and your uncle?

A. It didn't, no.

Q. And after those three days and his visit was over there, he and this Castro left?

A. Yes, they left.

Q. Which way were they going, so far as you know?

A. They were going toward Eureka. They were going to California, San Francisco.

Q. Where did they come from, do you know?

A. They came from California.

Q. They came out there for what purpose?

A. So far as I know hunting deer. They had already been at the Plummer ranch and came from the Plummer ranch to our place.

Q. How far is the Plummer ranch from the place where you live? A. Twenty-two miles.

Q. Is that ranch occupied by Edgar Lane Plummer? A. Yes.

Q. He is a cousin of yours? A. Yes.

Q. And son of——

A. Son of Wilhelmenia.

Q. You have heard, during the course of this trial, about the circumstances of the so-called trust agreement? [378] A. Yes.

(Testimony of Floyd Sadler.)

Q. Also referred to as Exhibit 8? A. Yes.

Q. Have you seen it since the case come up?

A. I have seen a photostatic copy of the exhibit.

Q. When did you first see that?

A. When you mailed it to us at the ranch.

Q. That was after the suit was commenced, shortly after the suit was commenced?

A. Yes, shortly after.

Q. You mean that is the first time you ever saw the document? A. Yes.

Q. Is that the first time you ever heard in any way whatsoever that such a document existed?

A. Well, when my brother came back from Reno, shortly prior to that, or shortly after Alfred's death, he said something about a trust document that Mr. Kearney mentioned to him. I didn't know what the document would be or anything like that.

Q. That was shortly after your Uncle Alfred's death? A. Yes.

Q. In 1944? A. Yes.

Q. Prior to that and particularly at the time you were putting your money into the cattle out there, did you know anything about any trust or any agreement or anything of this sort at all? [379]

A. No; no, I didn't.

Q. The communications your brother made about the talk that he had with Mr. Kearney, that was the very first information you had of the existence of anything of that sort, is that right?

A. Yes.

Q. And later on you got this photostat copy of it? A. Yes.

(Testimony of Floyd Sadler.)

Q. Do you know anything about the so-called Eccles ranch? A. Yes.

Q. What do you know about it?

A. Well, I know it is the ranch that we have leased that is right by our ranch.

Q. When did you lease it? When did you acquire the lease? A. In 1928, I believe.

Q. Have you continued to hold it under lease ever since?

A. Yes, all the time I have been there since 1928 we have.

Q. That was owned by your uncle, Mr. Eccles, is that right? A. Yes.

Q. And he operated the ranch until 1928 and then moved to the Coast? A. Yes.

Q. And it is then that you got this lease, that is you and your father and brother?

A. No, I wasn't interested in the ranch at that time. However, I read the lease. [380]

Q. You knew there was a lease? A. Yes.

Q. But since you have become interested in it, that lease has continued on? A. Yes.

Q. Speaking from memory, can you tell us whether it is a term lease or yearly lease?

A. It is a yearly lease.

Q. Simply renewed from year to year?

A. Yes.

Q. Have you any idea of the value of that ranch?

Mr. Thompson: Objected to as immaterial.

The Court: Of this leased ranch?

Mr. Cooke: Yes.

(Testimony of Floyd Sadler.)

The Court: I can't see where that is material.

Mr. Cooke: The purpose of it is, it is a little bit indirect, maybe, the idea being to show in connection with our defense of laches that this lease had been acquired by Mr. Sadler and his sons and it has a certain value in connection with their ranch operations and that disassociated from the Sadler ranch or the Sadler ranch disassociated from this ranch, would go to the value. In other words, the value of the ranches includes the value of this lease and includes, of course, the value of the ranch land and profit. We think the ranch itself has a very substantial value in excess of the \$400 a year they pay and that it [381] would have some bearing upon the question of the property here and the manner in which these people had gone ahead and incurred obligations. For instance, in this property here they have become obligated to reconstruct buildings and return certain buildings that have been taken off of the property, I think. There are some obligations in connection with the property and it seems to us that it would complete the picture and complete the question of their operations out there to have it in. I wasn't quite correct. The allegation is, and I expect that would be the testimony if we are allowed to proceed, that the buildings have been torn down and under the terms of the lease must be replaced at the end of the lease, and that is an obligation these people have in it and it all enters into the cost of the operations and obligations and responsibilities they have incurred

(Testimony of Floyd Sadler.)

and when we consider that it was done without any notice on the part, at least of young Floyd and Reinhold Sadler, it seems to me it has a bearing.

Mr. Thompson: Do you have the lease, Mr. Cooke?

Mr. Cooke: No, I haven't. I never saw it, Mr. Thompson.

Q. Do you have the lease?

A. We haven't it here in Reno. It is out at the ranch.

Q. You could send out and get it, I suppose, if we have time?

A. I don't know if they could find it or not.

Q. No body out there except——

A. My brother's wife. [382]

Q. It is not recorded?

A. No, it is not recorded.

The Court: Well, I will permit the question.

Mr. Thompson: The question he asked, your Honor, was the value of the Eccles ranch. I do not see where that pertains to Mr. Cooke's offer. The value of the ranch does not have anything to do with the value of the lease. A lease that is to be renewed every year has a very uncertain value, does not have any direct relation to the value of the ranch.

Mr. Cooke: I will ask him what the value of the lease is.

The Court: Confine it to the value of the lease.

Q. I think we have heard testimony from your uncle that the rental payment was \$400 a year and

(Testimony of Floyd Sadler.)

then it was down to \$300 a year and you and your father and your brother pay the taxes?

A. Yes.

Q. Do you know anything about whether that is correct or not, so far as the rental?

A. The rental, since I have been back on the ranch, has been \$300 a year and we pay all the taxes.

Q. Do you know what the taxes amount to?

A. I couldn't give it to you offhand.

Edgar Sadler: \$100.

Q. Now in regard to the buildings on the land being torn down on this leased Eccles land, do you know anything about that? [383]

A. We moved the Eccles house. I say "we," I wasn't there at the time, but it was moved down to right near our ranch house and served as a bunk house, and part of the chicken houses and stable and everything like that has been torn down.

Q. And what about your having to replace those buildings if the lease is terminated?

A. I believe it says in the lease that all machinery and buildings will be returned in approximately the same shape as they were at the time of the lease.

Q. Coming down to the question of machinery and equipment, do you know what machinery you have at the ranch? A. Yes.

Q. What does it consist of, briefly?

A. Well, a truck and a tractor. These are comparatively new machines, 1940 truck and 1939 trac-

(Testimony of Floyd Sadler.)

tor; 1942 combine, and we have a drill, 8-ft. drill, I think we got in 1944 or 1945.

Q. Do you know anything about what they cost or what their value is?

A. Yes, I could give you the approximate cost on all of them.

Q. Give it to us.

A. Well, the truck, 1940, cost \$1100 approximately and the tractor and mowing machine together cost us—well, the mowing machine cost \$225 and the tractor cost \$927.

Q. Any other machinery there?

A. The combine new cost us \$450. [384]

Q. Just what do you mean by combine?

A. That is a machine to bind your grain and seed; bind grain principally on the ranch but you can bind alfalfa seed or any grass seed with it.

Q. What other item of machinery have you?

A. We have a drill. I think that cost about \$352. We have a disc that cost, oh, \$240 and some dollars, I think.

Q. Hay rakes, anything like that sort of thing?

A. Yes, we have two hay rakes, I believe cost \$96 a piece.

Q. How about plows and harrows and anything like that?

A. Well, we have plows and harrows and drags and oh, potato cultivators and garden tools.

Q. What kind of plows, so far as walking plows or horse plows?

A. We have a two-way horse plow and then we have walking plows and one sulky plow.

(Testimony of Floyd Sadler.)

Q. Do you have any horses on the ranch?

A. Yes.

Q. Do you use horses there?

A. We use horses in haying time and to feed cattle with, some of the spring work.

Q. You have now mentioned the principal items of farm equipment, machinery, etc.?

A. Yes, I believe I have—wagons—well, everything that is on a ranch. I did not give the wagons. They cost \$150 in 1945 or 1944. [385]

Q. That would be a total of somewhere around three and four thousand dollars?

A. I believe, yes, that would be a fair value on the equipment.

Q. Where did the money come from to pay for these things?

A. Well, it came out of what we call the ranch expenses.

Q. Well, I am talking about profits or proceeds or money used to pay for it?

A. Well, principally proceeds of cattle.

Q. What cattle?

A. My brother's and my father's and myself.

Q. Now with regard to that machinery, do you mean that you have one-third interest in that and your brother one-third interest and your father one-third?

A. Yes, all of it.

Q. And about when was that machinery acquired, this equipment?

A. Well, all this new equipment I gave the prices on was acquired since I came there in 1938.

(Testimony of Floyd Sadler.)

Q. And prior to that time, I suppose the equipment was purchased from time to time?

A. Oh yes.

Q. What I mean, in five or ten years prior to that?

A. Oh yes.

Q. That sort of equipment wears out about how often?

A. Well, of course, sometimes you have trouble with mowing machines, but in general I would say a horse mowing machine would [386] last eight or nine years, given reasonable care.

Q. A horse-drawn mowing machine?

A. Yes.

Q. These other pieces of machinery you have mentioned, can you give us any information at all as to the length of time they last with ordinary usage, such as they get out there?

A. Well, I would say a tractor should be servicable for about ten years. Of course, it would have to have a lot of repairs on it, new tires, but it would be still usable.

Q. What is your experience in regard to other improvements, in regard to fences?

A. Well, we have repaired a lot of fences and built quite a lot of new fence.

Q. Since 1930, we will say, or since you knew the place, do you know whether any new land was brought under cultivation?

A. Yes.

Q. How much?

A. Well, I would say around 40 acres.

(Testimony of Floyd Sadler.)

Q. What was the land before, just raw sagebrush land?

A. Yes, about half of it was raw sagebrush land and the other didn't have any sagebrush on it but it was so rough that nothing could be done with it.

Q. Did you reclaim that, plow it?

A. No, we never plowed the niggerhead land. We disced, harrowed it. [387]

Q. And seeded it? A. Seeded it.

Q. Into what?

A. Well, wild hay. What I mean by wild hay is grass hay, and strawberry clover.

Q. Put water on it?

A. Yes, irrigated.

Q. Did you have to fence it ?

A. No, we never fenced it.

Q. Was that open?

A. No, it is in one of the meadows.

Q. Already fenced?

A. Yes, already fenced.

Q. You just reclaimed it to use. About what year was that?

A. In 1939 or 1940, I couldn't say exactly.

Q. Did you do any work in connection with that? A. Yes.

Q. What did you do?

A. I disced it and harrowed it and levelled it off and my brother did the actual planting.

Q. Was levelling a hard job or not?

A. It was quite a little work.

(Testimony of Floyd Sadler.)

Q. What did you use, a bulldozer?

A. Well, used drags and harrows and discs to level it off so we could get on it. [388]

Q. You have it now in wild grass seed?

A. Yes.

Q. Anything else?

A. Wild grass, strawberry clover. That strawberry clover is clover that heads like a strawberry and it is very good pasture.

Q. Did you participate in the borrowing of money on any occasion on the cattle and on the ranch?

A. No, I have not borrowed any money. I was there and took part in the figuring, etc., that preceded the transfer of the mortgage from the RAC Corporation to the Bank of Eureka on the cattle.

Q. You mean there was no occasion when you participated in any borrowing?

A. No, I never signed my name to any of the paper.

Mr. Cooke: That is all, your Honor.

Cross-Examination

By Mr. Thompson:

Q. Mr. Sadler, you were going to school in Oakland, California, you say in 1927 and 1928?

A. I believe those were the years, yes. It covered the school term, I would say '26 and '27, covered one school term. 1927 and 1928 covered another school term. I believe they were the years.

Q. And also you went to college there?

A. I went to the Polytechnic College.

Q. That was in 1930, 1931 and 1932?

(Testimony of Floyd Sadler.)

A. Yes, I believe—well, it would cover a school year too. I [389] usually went in September and came back in June.

Q. During the time you were down there didn't you visit Clarence Sadler and his wife?

A. Yes, on a few occasions, I have.

Q. A few occasions each year while you were there? A. Yes.

Q. And don't you recall that on some of those occasions Clarence Sadler would ask you about the ranch and whether your father was going to sell it?

Mr. Cooke: I don't think this is cross-examination.

The Court: You may answer the question. Objection will be overruled.

A. Well, I can't remember. He would always ask me how my father and mother was and how were things on the ranch, but as far as selling the ranch, he never said a word, never did say anything to me about selling. I can't recall anything like that. It was more or less, well, just like I would come up to you and say, "How's business these days," or something; he would inquire about how things were on the ranch.

Q. You don't recall Clarence Sadler saying anything on those occasions to the effect that he would like to have your father sell the ranch so he could get his money out?

A. I do not. I was just going to school at that time. I don't think there would be any occasion for it.

(Testimony of Floyd Sadler.)

Q. Could your parents support you while you were going to school [390] down there?

A. Partially, yes. I also worked whenever I could get a job.

Mr. Thompson: That's all.

Mr. Cooke: That's all.

(Recess taken at 5:00 o'clock until Friday, October 18th.) [391]

Friday—October 18, 1946, 10:45 A.M.

Appearances same as at previous sessions.

The Court: Are you ready to proceed now?

Mr. Thompson: Plaintiff is ready, your Honor.

The Court: Have you any further cross-examination, Mr. Thompson?

Mr. Thompson: No, your Honor.

The Court: Have you any further examination of this witness, Mr. Cooke?

Mr. Cooke: We offer in evidence the original of the mortgage dated March 2, 1918, by Edgar Sadler and Alfred Sadler, to the Washoe County Bank to secure a note in the sum of \$16,500, together with the endorsement of the co-signers.

Mr. Thompson: No objection, your Honor.

The Court: It will be admitted in evidence as Defendant's Exhibit "C."

DEFENDANT'S EXHIBIT "C"

Real Mortgage, Edgar Sadler, and Alfred Sadler, to
Washoe County Bank, March, 1918. File 12179

This Mortgage, made this 2nd day of March, 1918, by and between Edgar Sadler, of the County of Eureka, State of Nevada, and Alfred Sadler, of the County of Washoe, State of Nevada, mortgagors, to Washoe County Bank, a corporation organized and existing under and by virtue of the laws of the State of Nevada, mortgagee,

Witnesseth:

That the mortgagors mortgage to the mortgagee all those certain pieces and parcels of land situate in the County of Eureka, State of Nevada, and particularly described as follows: to-wit:

The East half of the northeast quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section Twelve (12); the northeast quarter ($NE\frac{1}{4}$); the south half ($S\frac{1}{2}$); and the southwest quarter of the northwest quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section Thirteen (13); the east half of the east half ($E\frac{1}{2}$ of $E\frac{1}{2}$) of Section Twenty-three (23); all of Section Twenty-four (24); the north half ($N\frac{1}{2}$); and the north half of the south half ($N\frac{1}{2}$ of $S\frac{1}{2}$) of Section Twenty-five (25); and the east half of the Northeast quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section Twenty-six (26), all in Township Twenty-four (24) North, Range Fifty-two (52) East, Mount Diablo Base and Meridian.

Also, the southwest quarter of the southwest

quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$) of Section Seventeen (17); the southwest quarter ($SW\frac{1}{4}$); the west half of the southeast quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$); and the southeast quarter of the southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section Eighteen (18); the west half ($W\frac{1}{2}$); and the west half of the east half ($W\frac{1}{2}$ of $E\frac{1}{2}$) of Section Nineteen (19); the southwest quarter of the northwest quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section Twenty-nine (29); and the north half ($N\frac{1}{2}$) of Section Thirty (30); all in Township Twenty-four (24), Range Fifty-three (53) East, Mount Diablo Base and Meridian;

Containing approximately Three Thousand One Hundred Twenty (3120) acres, and constituting what is commonly known as the Diamond Valley Ranch;

Together with all the waters of Big Shipley Springs Flowing or to flow to, over or through said lands hereinbefore described, together with all water, water rights, dams, ditches, flumes, water-ways and privileges used for the irrigation of said lands from said springs, and also with all of the water of those certain springs situate in the northeast quarter ($NE\frac{1}{4}$) of Section Twenty-six (26), Township Twenty-four (24) North, Range Fifty-two (52) East, Mount Diablo Base and Meridian, flowing or to flow to, over or through said lands hereinbefore described, together with all the water, water rights, dams, ditches, flumes, water-ways and privileges used for the irrigation of said lands from said springs; As security for the payment to the

mortgagee of the sum of \$16,500, and interest, according to the terms of a certain promissory note of the same date herewith, in words and figures following:

\$16,500.00

Reno, Nevada, March 2, 1918.

Two years after date, without grace, for value received, we jointly and severally promise to pay to the order of Washoe County Bank, Reno, Nevada, at its Banking Office in Reno, Nevada, or wherever payment shall be demanded in the State of Nevada, California, or elsewhere, at the option of the holder hereof, Sixteen thousand five hundred Dollars in United States Gold coin, with interest in like coin, payable semi-annually, at the rate of eight per cent per annum from date hereof until paid. The makers and indorsers hereof waive demand, protest, notice and diligence. We further promise that if this note is not fully paid at maturity we will pay costs and expenses, including a reasonable Attorney's fee, that may be incurred in collecting this note or any part thereof.

(\$3.30 Rev. Stamps attached to original note and cancelled.)

EDGAR SADLER,
ALFRED SADLER,

This mortgage is also given to secure any future advances which the mortgagee may make to the mortgagors, or either of them, and any other indebtedness payable or which may hereafter become payable from the mortgagors or either of them, to the mortgagee, including the payment of interest

thereon, and the expenses and attorneys' fees hereinafter mentioned.

The mortgagors agree to pay and discharge, when the same shall become due and payable, all taxes, liens, assessments and other charges which are now or which may hereafter become a lien upon said premises, or any part thereof, and which may in effect be a prior charge thereon, during the continuance of this mortgage; and in default thereof, the mortgagee may pay and discharge such taxes, liens, assessments and other charges, and the sums so paid shall be deemed immediately repayable to the mortgagee, and shall bear interest at the rate of eight per cent per annum until paid.

This mortgage shall be void if the payments hereby secured be made when the same shall become due and payable, but in case of default in the payment of said principal sum or any other sum hereby secured, when the same shall become due and payable, the mortgagee, its successors or assigns, may sell said premises with the appurtenance, in the manner prescribed by law, and out of the proceeds arising from such sale, may retain the principal and interest of said promissory note, together with all costs and charges of such sale, including a reasonable attorney's fee to be allowed by the Court, and all other sums now owing or which may hereafter become owing from the mortgagors or either of them to the mortgagee, and all sums which the mortgagee may have expended for the protection of the title of said premises, and for the protection

of said security, including taxes, assessments, liens and other charges, and the over-plus, if any, shall be paid by the party making such sale, on demand, to the mortgagors, their executors, administrators or assigns.

In Witness Whereof, the mortgagors have hereunto subscribed their names, the day and year first above written.

/s/ EDGAR SADLER,

/s/ ALFRED R. SADLER.

State of Nevada,
County of Washoe—ss.

On this 2nd day of March, 1918, before me, the undersigned, a Notary Public in and for said Washoe County, personally appeared Edgar Sadler and Alfred Sadler, known to me to be the persons described in and who executed the foregoing instrument, who acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

Witness my hand and Notarial Seal, the day and year in this certificate first above written.

[Seal] /s/ ROBERT M. PRICE,
Notary Public.

Recorded at the request of F. Stadtmuller. March 9, A. D. 1918, at 56 minutes past 4 p.m., in Libre F,

of Mortgages, page 46, Records of Eureka County, Nevada.

EDGAR EATHER,
Recorder.

By.....
Deputy.

CHENEY , DOWNES, PRICE
& HAWKINS,
Attorneys at Law,
Reno, Nevada.

[Endorsed]: Filed October 18, 1946.

Mr. Cooke: We offer in evidence copy of document, being counterclaim of Louisa Sadler in case No. 2380 in the Fourth Judicial District Court of the State of Nevada in and for Elko County, the case being entitled Diamond Valley Land & Stock Company against Huntington Valley Land & Stock Company, Louisa Sadler, Clarence Sadler, and a number of other defendants.

Mr. Thompson: Do you know who prepared this copy, Mr. Cooke? [392]

Mr. Cooke: Yes, the clerk of the court at Elko.

Mr. Thompson: No objection, your Honor.

The Court: Exhibit may be admitted as Defendant's Exhibit "D."

DEFENDANT'S EXHIBIT "D"

In the Fourth Judicial District Court of the
State of Nevada, in and for the County of
Elko

No. 2380

HUNTINGTON AND DIAMOND VALLEY
STOCK AND LAND COMPANY, a corpora-
tion,

Plaintiff,

vs.

THE HUNTINGTON VALLEY STOCK AND
LAND COMPANY, a corporation, THE DIA-
MOND VALLEY LIVE STOCK AND LAND
COMPANY, a corporation, EASTERN NE-
VADA INVESTMENT COMPANY, a cor-
poration, LOUISA SADLER, administratrix
of the estate of Reinhold Sadler, deceased,
LOUISA SADLER, EDGAR SADLER,
BERTHA SADLER, ALFRED SADLER,
CLARENCE SADLER, ELDRED G. WIN-
NIE, HARVEY CARPENTER, W. G.
TOWNSEND, JOHN DOE, RICHARD ROE,
JOHN DOE COMPANY, a corporation, and
JOHN DOE COMPANY,

Defendants.

COUNTERCLAIM OF LOUISA SADLER

Now Comes Louisa Sadler, one of the defendant
above named, and for counterclaim against the said
plaintiff avers——

1. That she is the widow of Reinhold Sadler, who died on January 29, 1906; that said Reinhold Sadler from the time of the organization of the plaintiff corporation to the time of his death was the President and Manager of said plaintiff and a large stockholder therein; that title to most of the lands described in plaintiff's amended complaint is derived from the State of Nevada, upon applications and contracts therefor with the State of Nevada and patents issued by the State of Nevada.

2. That the said Reinhold Sadler at the time of his death was, and this defendant ever since has been, a resident of Carson City, Ormsby County, Nevada, at which place the Land Office of said State of Nevada is situate.

3. That in order to protect the rights of the applicants to purchase the lands described in plaintiff's amended complaint under said applications and contracts, and to acquire patent therefor, it was necessary that annual payments of interest be made upon said contracts and that the principal thereof should finally be paid, and that unless the same were made promptly the rights of the parties in whose name or for whose benefit said contracts were made would become forfeited and lost, and prompt and regular payments of the same was necessary in order to protect their rights therein and thereunder.

4. That since the death of said Reinhold Sadler, this defendant has from time to time paid, laid out and expended at the request and with the knowledge and for the use and benefit of said plaintiff many and various sums of money in payment of the principal and interest due upon the contracts with the State of Nevada for the lands described in plaintiff's amended complaint, said payments amounting to the sum of \$2804.70, no part of which has been paid, although demand therefor has been made, and that said sum is now due, owing and unpaid from said plaintiff to this defendant.

Wherefore this defendant, Louisa Sadler, prays judgment against the said plaintiff for the sum of \$2804.70 with interest thereon at the legal rate, and for costs of suit.

CURLER & CASTLE,
CHENEY, DOWNER, PRICE
& HAWKINS,

Attorneys for defendant,
Louisa Sadler.

State of Nevada,
County of Washoe—ss.

Alfred Sadler, being first duly sworn, deposes and says:

That he is a son of Louisa Sadler, whose counterclaim is hereinbefore set forth; that the attorneys for the said Louisa Sadler in the above entitled

action reside in the Counties of Elko and Washoe in the State of Nevada, and that the said Louisa Sadler resides in the County of Ormsby in said State and does not reside in either said Elko or Washoe County and is now absent therefrom, and for that reason is unable to verify said counterclaim; That the facts set forth in said counterclaim are within the knowledge of this affiant; that he has read the foregoing counterclaim and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

ALFRED R. SADLER.

Subscribed and sworn before me this 24 day of October, 1917.

[Seal]

MADELINE FITZGERALD,
Notary Public.

[Endorsed]]: Filed this 25th day of Oct. 1917.

[Endorsed]: Filed this 25th day of Oct., 1917.

Nevada. Defts. Exhibit D. Filed Oct. 18, 1946.
Amos P. Dickey, Clerk; By O. F. Pratt, Deputy.

Mr. Cooke: I suppose we ought at least give your Honor some substance of the exhibits as we go along. The mortgage, being Exhibit "C", which first went in, was the one your Honor has heard of being given by Alfred and Edgar Sadler March 2, 1918, at the time they made the borrow of \$16,500

from the Washoe County Bank and this mortgage was given in connection with the chattel mortgage that was given on cattle to secure that \$16,500. It also covers the same lands described throughout the documents here, the Diamond Valley Ranch, consisting of 3120 acres in Eureka County and the Big Shipley Springs, which seems to be a very important item as to the waterrights and ditches, and flumes and range rights, etc. The last document, being "D" for the defendant, Edgar Sadler, is a copy of that is designated a counterclaim of Louisa Sadler in the same action, No. 2380, mentioned in the previous offer, and it sets up in substance she is the widow of Reinhold Sadler, who died in January, 1906, that said Reinhold Sadler, from the time of the organization of the plaintiff corporation to the time of his death was the president and manager of said plaintiff and a large stockholder therein; that title to most of the lands described in plaintiff's amended complaint is derived upon application therefor with the State of Nevada [393] and patents issued by the State of Nevada, and Reinhold Sadler, at the time of his death was a resident of Carson City and that in order to protect the rights of the applicants in the purchase of these lands, Louisa Sadler sets forth the accrued interest from time to time on these said land applications, and in order to prevent a forfeiture of same that Reinhold Sadler advanced money from time to time prior to his death, with the request and knowledge and for the use and benefit of the plaintiff corporation, in the aggregate amount of

\$4804.70, no part of which has been paid, and verification of that is made by Alfred Sadler, who states his relationship to Louisa Sadler is son, and the inability of Louisa Sadler to verify and that the facts set forth are within the knowledge of the affiant, Alfred Sadler, the same are true, etc. in the usual form.

We offer in evidence another document designated counterclaim of Louisa Sadler, administratrix of the Estate of Reinhold Sadler, deceased, in the same action, No. 2380, as mentioned in the two preceding offers, and that is verified by Louisa Sadler on the 23rd day of October, 1917. That is prepared by the clerk of the court at Elko, the same as the preceding one.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit "E".

DEFENDANT'S EXHIBIT E

In the Judicial District of the Fourth Judicial
District of the State of Nevada, in and for the
County of Elko.

No. 2380

HUNTINGTON AND DIAMOND VALLEY
STOCK AND LAND COMPANY,
a corporation,

Plaintiff,

vs.

THE HUNTINGTON VALLEY STOCK AND
LAND COMPANY, a corporation, THE
DIAMOND VALLEY LIVE STOCK AND
LAND COMPANY, a corporation, EASTERN
NEVADA INVESTMENT COMPANY, a
corporation, LOUISA SADLER, administra-
trix of the estate of REINHOLD SADLER,
deceased, LOUISA SADLER, EDGAR SAD-
LER, BERTHA SADLER, ALFRED SAD-
LER, CLARENCE SADLER, ELDRED G.
WINNIE, HARVEY CARPENTER, W. G.
TOWNSEND, JOHN DOE, RICHARD ROE,
JOHN DOE COMPANY, a corporation, and
JOHN DOE COMPANY,

Defendants.

COUNTERCLAIM OF LOUISA SADLER
administratrix of the estate of
Reinhold Sadler, Deceased.

Now Comes Louisa Sadler, as administratrix of

the estate of Reinhold Sadler, Deceased, one of the defendants above named, and for counter claim against the said plaintiff, avers,—

I.

That for several years past she has been and now is the duly appointed, qualified and acting administratrix of the estate of Reinhold Sadler, Deceased.

II.

That continuously for twelve years prior to the death of said Reinhold Sadler, on January 29, 1906, the said Reinhold Sadler was President of said plaintiff, and the Manager of all the business carried on by the said plaintiff, and of all of the property claimed by it, including the lands and premises described in the plaintiff's amended complaint, and that during all of said time as such President and Manager of said plaintiff, the said Reinhold Sadler, at the request and with the knowledge of said plaintiff, and for its use and benefit, did perform work and services during the whole of said time as President of said Company, and the Manager of all of its business and property, and especially of the lands and premises described in said amended complaint, which said services were reasonably worth the sum of \$150 per month.

That nothing has been paid to defendant for or on account of said work and services, although

demand therefor has been made; That said work and services were performed in and about the property described in plaintiff's amended complaint, and in the care, management and preservation of the same.

That there is now due and owing from the plaintiff to this defendant by reason of said works and services, the sum of \$21,600.

Wherefore, this defendant prays that she may have judgment against the said plaintiff in the sum of \$21,600, with legal interest thereon, and for her costs of suit.

LOUISA SADLER.

CURLER & CASTLE

CHENEY, DOWNER, PRICE
& HAWKINS

Attorneys for said defendant.

State of Nevada,
County of Ormsby—ss.

Louisa Sadler, being first duly sworn, deposes and says that she is one of the defendants in the above entitled action; that she has read the foregoing counter claim, and knows the contents thereof, and that the same is true of her own knowledge, except

as to those matters therein stated upon information and belief, and as to those matters she believes it to be true.

LOUISA SADLER

Subscribed and sworn to before me this 23, day of October, 1917.

[Seal]

GEORGE SANFORD

Notary Public.

[Endorsed]: Filed this 25th day of Oct. 1917.

[Endorsed]: No. 371 U. S. Dist. Court, District of Nevada Defts. Exhibit No. E. Filed Oct. 18, 1946 Amos P. Dickey, Clerk; By O. F. Pratt, Deputy.

Mr. Cooke: Plaintiff's Exhibit "E", as already stated, is counterclaim of Louisa Sadler in the same case as already stated and is a claim setting forth that she is the duly appointed and [394] qualified administratrix of the estate of Reinhold Sadler, deceased, and that for 12 years prior to the death of Reinhold Sadler, which was on January 29, 1906, the said Reinhold Sadler was the president of the plaintiff, the Huntington & Diamond Valley Stock and Land Company and the manager of all the business carried on by the plaintiff and all property claimed by it, including the lands and premises described in plaintiff's amended complaint, which includes the Diamond Valley Ranch; that during all of said time, as such president and manager of said plaintiff, the said Reinhold Sadler, with the know-

ledge of said plaintiff and for its use and benefit, did perform work and services during the whole of said time as president of said company and manager of all its business and property and especially of the lands and premises described in said amended complaint, which said services were reasonably worth the sum of \$150 per month. Then it is alleged nothing was paid to the defendant for or on account of said work and services, that the said work and services were performed in and about the property described in the plaintiff's amended complaint in the care, management and preservation of same. That there is now due and owing from plaintiff to this defendant, by reason of said work and services, the sum of \$21,600, with interest, and that is verified by Louisa Sadler, signed by her and also by Curler & Castle, and Cheney, Downer, Price & Hawkins, attorneys for said defendant.

We offer in evidence document designated as counterclaim of Edgar Sadler, introduced in the same case, namely No. 2380, same [396] case mentioned in the two proceeding offers, and it is verified on behalf of Edgar Sadler by Alfred Sadler on October 23, 1917, and signed by Curler & Castle, Cheney, Downer, Price & Hawkins, attorney for claimant.

Mr. Thompson: No objection your Honor.

The Court: It may be admitted as Defendant's Exhibit "F".

DEFENDANT'S EXHIBIT F

In the District Court of the Fourth Judicial District
of the State of Nevada, in and for the
County of Elko

No. 2380

HUNTINGTON AND DIAMOND VALLEY
STOCK AND LAND COMPANY,
a corporation,

Plaintiff,

vs.

THE HUNTINGTON VALLEY STOCK AND
LAND COMPANY, a corporation, THE
DIAMOND VALLEY LIVE STOCK AND
LAND COMPANY, a corporation, EASTERN
NEVADA INVESTMENT COMPANY, a
corporation, LOUISA SADLER, Administra-
trix of the estate of REINHOLD SADLER,
Deceased, LOUISA SADLER, EDGAR SAD-
LER, BERTHA SADLER, ALFRED SAD-
LER, CLARENCE SADLER, ELDRED G.
WINNIE, HARVEY CARPENTER, W. G.
TOWNSEND, JOHN DOE, RICHARD ROE,
JOHN DOE COMPANY, a corporation and
JOHN DOE COMPANY.

Defendants.

COUNTER CLAIMS OF EDGAR SADLER

Now comes Edgar Sadler, one of the defendants
in the above entitled action, and for counter claims
against the said plaintiff, avers,—

I.

That he is a son of Reinhold Sadler, who, prior

to his death in January, 1906, was for many years the President of the plaintiff non-resident corporation, and the manager of all the businesses carried on by the plaintiff, and all property claimed by it, including the lands and premises described in the plaintiff's complaint; that prior to the death of said Reinhold Sadler, this defendant had been in the employ of said plaintiff and was familiar with its business and holdings; that very shortly after the death of said Reinhold Sadler, this defendant was employed by the plaintiff as its resident agent in the State of Nevada, and as the manager of its business and property in the State of Nevada, and continued as such resident agent and manager and as such performed work and services for the plaintiff, and its request and with its knowledge, during the whole of the years 1906, 1907, 1908, 1909, 1910, and 1911, which said services were reasonably worth the sum of One Hundred and fifty Dollars per month.

That nothing has been paid this defendant for or on account of said work and services, although demand therefor has been made. That said work and services were performed in and about the properties described in said plaintiff's amended complaint, and in the care, management and preservation of the same.

That there is now due and owing from plaintiff to this defendant by reason of said work and services, the sum of Ten Thousand and Eight Hundred Dollars.

II.

For a second counter claim against said plaintiff, the defendant Edgar Sadler, avers,—

That heretofore and since January, 1905, this defendant has paid out and expended, at the request and with its knowledge and for the use and benefit of the plaintiff, and in the care, management and preservation of the lands and premises described in plaintiff's amended complaint, large and many sum of money, and this defendant has received divers credits on account thereof, and that there is now due, owing and unpaid from the plaintiff to this defendant, as a balance due on account of the money so paid out and expended by this defendant for the use and benefit of the plaintiff, as aforesaid, the sum of \$3398.55 no part of which has been paid, although demand therefor has been made.

Wherefore, defendant Edgar Sadler demands judgment against said plaintiff on the first counter claim herein, in the sum of \$10,800, and on the second counter claim in the sum of \$3398.55, with legal interest thereon, and for his costs of suit.

CURLER & CASTLE,

CHENEY, DOWNER, PRICE,
& HAWKINS,

Attorneys for defendant.

State of Nevada,
County of Washoe—ss.

Alfred Sadler, being first duly sworn, deposes and says that he is a brother of Edgar Sadler, whose counter claim is hereinabove set forth; that the attorneys for the said Edgar Sadler reside in the Counties of Elko and Washoe, in the State of Nevada, and that the said Edgar Sadler does not reside in either said Elko or Washoe County, and is now absent therefrom, and for that cause is unable to verify said counter claim; that the facts set forth in said counter claim are within the knowledge of this affiant; that he has read the foregoing counter claim and knows the contents thereof, and that the same is true of his knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

/s/ ALFRED SADLER.

Subscribed and sworn to before me, this 23rd day of October, 1917.

[Seal]

JOHN S. SINAI,
Notary Public.

[Endorsed]: Filed this 25th day of Oct. 1917.

[Endorsed]: No. 371 U. S. Dist. Court, District of Nevada. Defts Exhibit No. F. Filed Oct. 18, 1946. Amos P. Dickey, Clerk; By O. F. Pratt, Deputy.

Mr. Cooke: Defendant's Exhibit F appears to contain counterclaims of Edgar Sadler, one of the defendants, and it is alleged in substance that he is the son of Reinhold Sadler, who prior to his death in January, 1906, was for many years the president of the plaintiff non-resident corporation and managed all the business carried on in all the property claimed by it, including lands and premises described in plaintiff's complaint, and prior to the death of Reinhold Sadler this defendant had been in the employ of said plaintiff and familiar with its business and holdings; that very shortly after the death of said Reinhold Sadler, this defendant was employed by the plaintiff as its resident agent in the State of Nevada and as the manager of its business and property in the State of Nevada, and continued as such resident agent and manager and performed work and services for the plaintiff and at its request and with its knowledge during the whole of the years 1906, 1907, 1908, 1909, 1910, and 1911, which said services were reasonably worth the sum of \$150 per month. That nothing has been paid and that the work so performed in the preservation and management of said property is now due in the sum of \$10,800. The second counterclaim is in substance that [396] since January, 1905, this defendant, Edgar Sadler, has paid out and expended, at the request and with the knowledge, for the use and benefit of the plaintiff corporation, in its care, management and preservation of the land and premises described the amended complaint, large

and many sums of money and this defendant has received divers credits on account thereof and that there is now due, owing and unpaid from the plaintiff the sum of \$3398.55, no part of which has been paid, although demand therefor has been made, and then follows the demand for judgment on both counterclaims, the first one being for \$10,800 and the last one for \$3398.55, signed by the plaintiff as in the previous offer, naemly Curler & Castle and Cheney, Downer, Price & Hawkins, and verified by Edgar Sadler and Alfred Sadler, and so on.

We offer in evidence a certificate issued by the State Department of Agriculture as to the cattle brand of Floyd Sadler. It is signed by Edward—I can't make out the name, executive officer on behalf of the State Board of Stock Commissioners.

Mr. Thompson: We do not dispute that that brand, F hanging 3, is his brand.

Mr. Cooke: We might as well file it as an exhibit.

Mr. Thompson: We do not object, your Honor.

The Court: It will be admitted in evidence as Defendant's "G".

Mr. Cooke: I offer in evidence a certificate of brand recording issued by the State Department of Agriculture, dated [397] October 12, 1946 and signed by the same officer, on behalf of the same board of Stock Commissioners, as to the brand described as interlocking half circles of Edgar Sadler.

Mr. Thompson: If the Court please, we do not object to that offer insofar as it is a record, but we do object to it if it is offered as proof of the ownership of cattle bearing that brand, as a self-serving document.

The Court: Well, it would be evidence of Mr. Edgar Sadler's brand.

Mr. Thompson: Evidence that that brand is now recorded in the name of Edgar Sadler, we have no objection to it for that purpose, but we do not concede this is a proper proof of ownership of cattle bearing the brand.

Mr. Cooke: Well, we offer it without any strings, your Honor, for whatever it is worth.

The Court: It might be evidence of the contention that the cattle were owned by Mr. Sadler, but of course that would be better for the Court to determine in consideration of the case.

Mr. Cooke: I think it is just one of the phases of evidence in the case.

The Court: I think so. It may be admitted as Defendant's Exhibit "H".

46 Oct 12 AM 9:28

STATE DEPARTMENT
OF AGRICULTURE

STATE OF NEVADA
DEPARTMENT OF AGRICULTURE
CERTIFICATE OF BRAND RERECORDING

This is to certify that the INTERLOCKED HALF CIRCLES brand shown hereon, together with the marks and accessory data as entered on our records, has been rerecorded in the name of EDGAR SADLER address EUREKA, NEVADA for a period of five years ending December 1950, in accord with the provisions of Section 13, Chapter 26, Statutes of Nevada 1923, as amended February 19, 1925. RIGHT HIP CATTLE

STATE BOARD OF STOCK COMMISSIONER

By Edward Records
Executive Officer.

Brand



right left

ENDORSED:

1946 Oct 12 AM 9:28
STATE DEPARTMENT OF AGRICULTURE
No. 371
U.S. Dist. Court, District of Nevada
Deft's Exhibit No. H
Filed Oct 18 1946
Amos P. Dickey, Clerk
By O. F. Pratt, Deputy

Mr. Cooke: We offer in evidence certificate of brand recording, dated October 12, 1946, issued by the State Department [398] of Agriculture, signed by the same officer on behalf of the State Department of Stock Commissioners, as to the T E combined brand of Reinhold Sadler. On the back of it is an endorsement made by the State Board of Stock Commissioners and sort of explanatory note.

Mr. Thompson: I have no objection, your Honor.

The Court: It may be admitted in evidence as Defendant's Exhibit "I".

Mr. Cooke: We offer in evidence what purports to be a letter addressed to Edgar Sadler, dated May 6, 1944, and signed "Clarence." The body of the letter is in typewriting.

Mr. Thompson: I have no objection your Honor.

The Court: It may be admitted as Defendant's Exhibit "J".

Mr. Cooke: This Exhibit "J", as previously stated, is letter dated May 6, 1944, signed "Clarence", addressed to Mr. Edgar Sadler, and reads:

"Dear Edgar: I have heard that since Alfred's death you have repudiated the trust agreement of March 2, 1918. It is hard for me to believe that can be true, for we have treated you right in every way.

"The agreement shows that you and Alfred agreed to take title to and hold in trust for Father's heirs the Diamond Valley Ranch property and livestock.

"Do you really repudiate this trust after all these years during which time you have had a free hand? You know that in 1933 and again in 1937 you were willing to buy us out but you could not raise the money.

"Please let me hear from you.

Your brother, Clarence."

We offer in evidence what purports to be a letter dated Reno, Nevada, September 13, 1937, addressed "Dear Edgar" and signed "Alfred."

Mr. Thompson: Do you state that that letter is a letter which was received by Edgar Sadler?

Mr. Cooke: Well, maybe I should ask him about it.

Mr. Thompson: Well, if you state that it is.

Mr. Cooke: I don't know, Mr. Thompson, really, to tell the truth. May I interrupt the proceedings?

The Court: Yes.

MR. EDGAR SADLER

having been previously sworn, testified as follows on

Direct Examination

By Mr. Cooke:

Q. Mr. Sadler, will you look at the paper addressed "Dear Edgar" and signed "Alfred",

(Testimony of Mr. Edgar Sadler.)

dated September 13, 1937, and state if that is in the handwriting of Alfred Sadler? A. Yes.

Q. You knew his handwriting? A. Yes.

Q. And state if you received that in due course of the mails [400] from him? A. Yes.

Q. After or about the time or shortly after the date of it? A. Yes sir.

Q. And then you delivered it to me shortly after this suit was commenced? A. Yes sir.

Mr. Thompson: We have no objection to the letter, your Honor.

The Court: It may be admitted in evidence as Defendant's Exhibit "K".

DEFENDANT'S EXHIBIT K

Reno, Nevada

Sept. 13, 1937

Dear Edgar:

I heard a report that you were selling all the cattle on the ranch and range; about 800 head for \$60.00 per head. What is going on and doing, have you an offer for the ranch property also? What is the plan, this is all news to me. Is the program that you are quitting the ranch and let the Federal Land Bank foreclose on the loan that we borrowed on the ranch. If so, I would like to know. Are you selling out to Reinhold and Floyd and they thinking of running the ranch? If so, I do not see on what sort of plan they figure to do this.

(Testimony of Mr. Edgar Sadler.)

Cattle being sold might just sell the ranch and wind up the whole concern.

Clarence will be hearing of this report and I will be receiving some hot letters to know where he is coming off in the interest he claims in the ranch. (a $\frac{1}{4}$ interest.)

He seems to know about that \$3000.00 loan that took a year to get from the Federal Land Bank and said he does not understand why you did not secure a commission loan of \$10,000.00 and pay him \$6,000 for the $\frac{1}{4}$ interest, he owns.

I suppose you are through with cutting and putting up the hay. It is warm weather down here at present. The children are all going to school now, with love and kisses from all of us all to you all,

your Brother,
/s/ ALFRED

[Endorsed]: Filed Oct. 18, 1946.

Mr. Cooke: Defendant's Exhibit "K," which I have had typewritten for easier reading, is this letter of September 13, 1937 and reads:

"Dear Edgar:

I heard a report here that you were selling all the cattle on the ranch and range; about 800 head for \$60.00 per head. What is going on and doing, have you an offer for the ranch property also?

(Testimony of Mr. Edgar Sadler.)

“What is the plan, this is all news to me. Is the program that you are quitting the ranch and let the Federal Land Bank foreclose on the loan that we borrowed on the ranch. If so, I would like to know. Are you selling out to Reinhold and Floyd and they thinking of running the ranch? If so, I do not see on what sort of [401] plan they figure to do this.

“Cattle being sold might just sell the ranch and wind up the whole concern.

“Clarence will be hearing of this report and I will be receiving some hot letters to know where he is coming off in the interest he claims in the ranch. (A $\frac{1}{4}$ interest.)

“He seems to know about that \$3,000.00 loan that took a year to get from the Federal Land Bank and said he does not understand why you did not secure a Commission loan of \$10,000.00 and pay him \$6000 for the $\frac{1}{4}$ interest he owns.

“I suppose you are through with cutting and putting up the hay. It is warm weather down here at present. The children are all going to school now. With love and kisses from us all to you all.

Your Brother

Alfred.”

(Testimony of Mr. Edgar Sadler.)

Q. Mr. Sadler, have you looked at this paper, what purports to be a letter dated September 14, 1933, and addressed to "Dear Edgar" and signed "Alfred"? Will you state, if you know, whose handwriting that is in?

A. That is Alfred's.

Q. Did you receive that in due course of mail at or about the time it is dated? [402]

A. Yes sir.

Q. And you forwarded it to me?

A. Yes sir.

Q. It is now in the same condition as you received it, so far as the contents are concerned?

A. Yes sir.

Q. You have no envelopes for any of these letters?

A. Well, I don't know. I have so many papers home that I don't know if the envelope is there or not.

Mr. Cooke: We offer the document in evidence.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted in evidence as Defendant's Exhibit "L".

Mr. Cooke: Exhibit "L", the contents reads:

"I have not heard in regard to what you think about the buying of the interest I hold in the ranch. From the present looks of things, I will no doubt be let out of the position down here as they are short of funds to continue the same work in surveying the Public Lands. I guess I will have to give Clarence \$5000.00 cash for the interest he claims in the estate.

(Testimony of Mr. Edgar Sadler.)

He wants to buy a house and quit paying rent.

"If I am let out from this job, I will need money to buy a house and then by getting work no doubt can earn about \$100 a month which is the least I can run my [403] family on. But to pay rent for a house, I can not make the grade on \$100 a month and pay \$50 a month rent.

"Things seem to be slow in picking up and the banks are still closed here. No chance to get money around here.

"From what I learned at Berkeley on my few days visit down there, it appears that there would not be much trouble to make a loan from the Federal Land Bank as they seem anxious to loan money on farms.

"Sorry that Floyd had to be let out from the surveying job. He should take the Civil Service Examination as he is young and no doubt could land a fair position, as they are now giving these examinations. My age now is what puts me out of taking a new examination.

"My family is in fair health and we are making the best of conditions.

"Hope that you are all well, and making the best of conditions.

"Maybe Reinhold and Floyd would go in with you in regard to the ranch proposition.

"Love from us all

Your Brother

Alfred." [404]

Q. Mr. Sadler, I show you what purports to be a letter dated September 2, 1933, addressed "Dear Edgar," consisting of three pages in lead pencil writing and appearing to be signed "Alfred." Will you look that over and state if you ever saw that document before? A. Oh, yes.

Q. Whose handwriting is that in?

A. Alfred's.

Q. And did you receive that in the regular course of mails? A. Yes, sir.

Q. And so far as you know, about the time it is dated? A. Yes, sir.

Q. It is one of the letters that you turned over to me after this suit was commenced?

A. Yes, sir.

Mr. Cooke: We offer it in evidence.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted in evidence as Defendant's Exhibit "M."

Mr. Cooke: Defendant's Exhibit "M" reads:

"Dear Edgar:

"A few lines to say that I am in fair health and the rest of the family are in fair health. I just returned from a few days down in Berkeley and San Francisco.

"I was over to the Berkeley Land Bank which has the [405] mortgage on the ranch. I inquired into conditions and find the situation good in regard to securing a loan. The question is as follows:—now since Reinhold is married and intends to live on the ranch and con-

(Testimony of Mr. Edgar Sadler.)

tinue in this line, I thought that you and him would like to buy my interest out in the property. I believe that the same could be done if you and Reinhold intend to go together and run the same.

“The plan would be as follows for you to have Mr. Hatch of Elko make a new appraisal of the property and then get a loan from the Federal Land Bank as you and Reinhold and Floyd if you want him interested, cancelling the old loan that you and I owe to Federal Land Bank as of date May 1, 1933. We owe the Federal Land Bank \$12,271.77. Now you and Reinhold get a loan from Federal Land Bank of \$18,000 on the ranch and loan from the Bank Commissioner of \$5,000, making a total of \$23,000 on the property, then pay off the loan of \$12,271.77 that you and I owe to the bank—\$ 2300.00

12271.77

10728.23

buy my interest or just get this loan and give me \$10,000 for my interest in the property.

“This can be done as I saw Mr. Long and Mr. Huston. Mr. Huston is the head appraiser. Now Mr. Harch of Elko would have to make a new appraisal on the ranch [406] and if sent down inside of the next sixty days, I understand the deal could go through. Mr. Hatch appraisal

(Testimony of Mr. Edgar Sadler.)

with yours and Reinhold's application for this loan of \$23000 would come before Mr. Huston and no doubt his O.K. will be on the same. Mr. Huston called up the General Counsel of the Federal Land Bank and he told Mr. Huston that the plan was all right so far as he could see at present.

"This means quick action so that the funds will not be all loaned out. They seem to want to do business and after Mr. Hatch appraisal with your and Reinhold's application for this loan, I do not see any hitch.

"Let me know after you talk the same over with Reinhold in regard to the same.

"Your Brother,

"ALFRED.

"P. O. Box 433, Reno, Nevada."

Q. Mr. Sadler, would you look at what purports to be a letter dated July 28, 1932, addressed "Dear Alfred" and signed "Clarence," and I will ask you to state in whose handwriting that is?

A. That is Clarence's.

Q. Do you know under what circumstances that came into your possession?

A. It was sent through the mail. [407]

Q. Well, that is addressed "Dear Alfred."

A. Well, he sent it to me.

Q. Alfred? A. Yes.

(Testimony of Mr. Edgar Sadler.)

Q. Do you remember about the time you got it? It is dated July 28, 1932.

A. Well. I guess when he got the letter he sent it on to me.

Q. Some time after that? A. Yes.

Q. Attached to the portion in ink is a lead pencil sheet. Did that come with the letter that you received as you received it from Alfred, do you remember? A. I think it did.

Q. Whose handwriting is it in, if you know?

A. That is in Alfred's writing.

Q. That is that lead pencil sheet? A. Yes.

Q. And the one in ink is in Clarence's?

A. Yes.

Mr. Cooke: We offer it in evidence.

Mr. Thompson: We have no objection, your Honor.

The Court: It may be admitted in evidence as Defendant's Exhibit "N."

Mr. Cooke: The Defendant's Exhibit "N" is a letter of July 28, 1932, and reads: [408]

"Dear Alfred: I called at the Federal Farm Bank in Berkeley this morning and got some information on the ranch loan. I am enclosing sheet with the figures. Mr. Hodgson believes that we could increase the loan to \$18500. Of course, if another application is made for money it will require another appraisal. The loan now is \$13000. You will note from the sheet that in March, 1930, Edgar tried to borrow \$4000 more

(Testimony of Mr. Edgar Sadler.)

to invest in cattle. Don't you think it is about time he starts in buying our share instead of borrowing more money on the land and investing same in cattle exclusively for his benefit? We should go after him to borrow this \$5000 from the bank and another \$5000 on his cattle and buy us out. Then he would have the whole thing and could do with it as he pleased. Instead he wants to put more debt on the land entirely for his benefit. It is about time we made a move. Don't believe he made application for the money after our talk in Reno because there was no reference to the matter in the file. You will note the bank's appraisal is on \$40000 and says the ranch will bring \$30000 on a forced sale. This would be about \$5000 apiece after the loan is paid if the Court at Carson should order it sold and distribution be made of the money between the heirs. [409]

"You will also note that a part of the loan went to Tom Dixon on cattle for the ranch. Of course, Edgar and Ethel now claim these cattle.

"We are looking for Helen to come down. Suppose she is waiting on Bryson. We are having warm weather. How are your teeth these days? Hope you are getting use to the plates. We are all well and hope you all are in good health. Kindest regards to outsiders and love & kisses to the family from all of us.

"Your Brother,

"CLARENCE.

(Testimony of Mr. Edgar Sadler.)

“I think it would be a good idea to let Edgar know I am looking into matter. Maybe it would bring him to action so he would arrange for loan.”

Then the lead pencil sheet mentioned is some notations that Edgar borrowed in 1928 13 thousand dollars at 5 per cent and writing about lumber and cattle and garage, etc., Eureka County Bank \$8500.

The Court: The lead pencil writing was in the hand of——

A. Alfred.

The Court: And the other in the hand of Clarence? A. Yes.

Mr. Thompson: Don't you think that is incomplete without explanation of the witness. I was wondering if you were reading what was there or trying to fill in.

Mr. Cooke: No, just reading the high spots: “11510 plus [410] \$650 membership in Elko Stock Assoc. Will get \$650 back when loan is paid.” Then refers to an appraisal by the bank: “190 acres at \$35 per acre, 1000 acres at \$20 per acre, 600 acres at \$10 per acre, 1080 acres at \$2 per acre, 250 acres at none,” making up the total of 3120 acres, and the buildings \$6500. Well, the aggregate of land value is \$34,810 and buildings \$6500, making total of \$41,310. Then sets up payments on interest November and May 1st, \$390; loan has never been decreased. “Believe loan can be increased to \$18500. Bank will loan 50% of appraised value of property

(Testimony of Mr. Edgar Sadler.)

and 20% of appraised value of buildings. Loan runs 36 years. On March 28, 1930, Edgar tried to borrow \$4000 more to buy cattle. Said he had \$4000 and with other \$4000 from bank would go to buy cattle. Bank refused to make loan on cattle. Record shows Edgar has between 500 and 600 head of cattle."

Q. Mr. Sadler, I show you what purports to be a letter dated October 23, 1928, addressed to "Dear Edgar" and appearing to be signed "Alfred" and I wish you would look that over and state, if you know, whose handwriting that is?

A. That is in Alfred's handwriting.

Q. And what is that, is that a letter that you received from him?

A. Yes, sir.

Q. And so far as you know was that received by you in the regular course of mails at or about the time it is dated?

A. Yes, sir. [411]

Q. And kept in your possession until delivered to me after the suit was brought?

A. Yes, sir.

Q. The contents are now in the same condition as they were when you received it?

A. Yes, sir.

Mr. Cooke: We offer it in evidence.

Mr. Thompson: We have no objection, your Honor.

The Court: It may be admitted in evidence as Defendant's Exhibit "O."

(Testimony of Mr. Edgar Sadler.)

Mr. Cooke: The Exhibit "O" is dated October 23, 1928, addressed "Dear Edgar" and reads:

"A few lines to let you know that we are all enjoying fair health except my wife. She has headaches and is very nervous. The doctor is giving her gland medicine as he says some of the glands are not functioning right. I notice in the papers that John Eccles has sold his cattle and intends to move to Oakland, California. What do they intend doing with the place up. No doubt from the sale of the cattle he paid Mrs. Eccles and Tom for their interest in the ranch. Does John intend buying a place down in California or what is he going to do. I judge that he secured a good price for the cattle, that is why he sold the same, or was he just tired of trying to make a go of the place and [412] concluded that he would try something else. No doubt you received the paper in regard to the mortgage that I sent up after signing and have sent the same down to the Federal Reserve Land Bank at Berkeley, before they will grant the loan that you made application quite a while back.

"In the coming election, support Tom Lotz for State Surveyor General as he favored us many ways. In fact loaned mother money in regard to when the lands were patented on the Diamond Ranch during the misup. Of course mother paid him back but I think that he is the best fitted for the job and understands the same.

(Testimony of Mr. Edgar Sadler.)

“Pittman also has favored us and we should help him in this fight against Platt if possible. The fight between Pittman and Platt is going to be very close. I believe that there is going to be some big surprises this election.

“The weather down here is pretty fair but there is generally a frost each morning but the days are nice. The mountains have had several snow storms but the snow did not stay extra long on the same.

“Plenty of changes are taking place down this section. Quite a number of merchants are selling out or forced out. The big stores make it so hard that they cannot make a go of the business. The rents being so [413] high.

“I do not know of any special news that might be of interest to you. Therefore will close with love and kisses to all from us all. Kind regards to inquiring friends.

“Your brother,

“ALFRED.”

Q. Mr. Sadler, I show you what purports to be a letter signed “Alfred Sadler” and addressed to “Dear Edgar” and dated Reno, Nevada, September 15, 1928, and ask you to state, if you know, what that document is and in whose handwriting it is? A. That’s his writing.

Q. Whose writing? A. Alfred’s.

(Testimony of Mr. Edgar Sadler.)

Q. There are four pages to this letter. Does that apply to all four? A. Yes.

Q. When did you receive this letter?

A. A few days after it is dated there.

Q. And it is now in the same condition, so far as the contents are concerned, as it was when you received it? A. Yes, sir.

Mr. Cooke: We offer it in evidence.

Mr. Thompson: We do not have any objection, your Honor. He can start reading it. [414]

The Court: It may be admitted in evidence as Defendant's Exhibit "P."

Mr. Cooke: Exhibit "P" is letter dated September 15, 1928, addressed "Dear Edgar":

"I am writing to inquire whether you were able to secure the loan with the Federal Reserve Bureau in regard to the ranch or whether you were still continuing the loans with the Banks. At that time you said that it might take a few months before they would let you know or take action in the matter. The reason of this is I will have to make a borrow of Five Thousand Dollars because I want to buy or start a home. I do not want to borrow from the Building & Loan Companies because their rate of interest is so high, if possible. I was thinking that perhaps you could get the money from the Eureka Bank or Bank in Elko. Do you think it possible to get the same from either bank say for a period of ten years and pay about 7% inter-

(Testimony of Mr. Edgar Sadler.)

est per year. My plan is as follows, you to borrow the money for me on the ranch. I to pay you back the same as soon as possible which would take 8 or ten years. As you can judge from the following: \$5000, .07, \$350.00 interest per year; 10 years, \$3500.00 as interest; \$5000 principal * * *

and then follows some further computations along the same line: [415]

“Thus on thru, I judge that it would take 8 or ten years to pay the same.

“As it stands now, I am paying rent and see little for the same and think that if I can do something in this way I might have a home or something in about twelve years. The main thing with me now is for me to keep my health and be able to hold my position or have work that will keep me going to make ends meet. I know that if you have made the loan with the Federal Reserve Bureau, the ranch is tied up anyway for from 5, 10 or 15 years. (Unless some one should come along and be willing to buy the same at a price that you thought the ranch should bring.

“Let me know as soon as possible how conditions are and whether you think it feasible to secure the loan. Say even for 5 years it would be a start in getting a home, and if only for a period would mean an equity in something, which means the saving of something. Now as it

(Testimony of Mr. Edgar Sadler.)

stands paying out for rent one does not have anything to show for the money at the end of each year.

“I would like to know whether you think it possible that you could secure the amount. I know that on account of the conditions in Reno that money is tight and would be hard to secure. Also on account of the Presidential election money seems to be tied up somewhat and hard to get right at present. My idea is to buy a five or six [416] room house for a home. My wife has not been in extra good health since the little girl was born and I think by getting a place it would give her something to work for and help and not be so large as the place we are renting and the work would be less. Then one knows that everything is not being paid out for rent. This makes her worries and trouble to think that everything is going and nothing saved. Now I hope that you and your family are all enjoying fair health and doing the best possible. I do not know how things are looking up in that section but hope that they are better than last year. Now let me know as soon as possible whether you think that the loan could be secured.

“With love to all from all of us,

“Your brother,

“ALFRED SADLER.”

The Court: We will recess at this time. The Court will be in recess until Monday morning at 10:00 o'clock in Reno in this case. Let the record show that in adjourning today we adjourn in respect to the memory of George Thatcher.

(Court adjourned at 4:30 p.m.) [417]

Monday, October 21, 1946

10:00 A.M.

Appearances: Bruce R. Thompson, Esq., Attorney for Plaintiff.

H. R. Cooke, Esq., John D. Furrh, Jr., Esq., Attorneys for Defendant Edgar Sadler.

Mr. Thompson: Your Honor, Mr. Springmeyer hasn't arrived but we have no objection to proceeding.

Mr. Cooke: No objection.

The Court: Would you like to have the Court wait a few minutes?

Mr. Thompson: No, that is all right, your Honor.

MR. EDGAR SADLER

resumed the witness stand on further

Direct Examination

By Mr. Cooke:

Q. Mr. Sadler, I show you what purports to be letter dated April 13, 1928, and addressed to "Dear

(Testimony of Mr. Edgar Sadler.)

Edgar" and signed "Alfred." I ask you to look that over and state if you know what that is.

A. That is a letter from Alfred to me.

Q. Did you receive that letter about the time it is dated, or shortly after? A. Yes.

Q. And in the regular course of the mails?

A. Yes.

Q. And the letter is now in the same condition, so far as contents are concerned, as it was when you received it? A. Yes, sir. [418]

Mr. Cooke: We offer it in evidence.

Mr. Thompson: We have no objection, your Honor.

The Court: The exhibit may be admitted in evidence as Defendant's Exhibit "Q."

Mr. Cooke: Exhibit "Q" reads, from my copy, as follows:

"Reno, Nevada, April 13, 1928. Dear Edgar: Your letter received and contents noted.

"I have signed the applicant that H. U. Castle sent in regard to the Federal Bank Reserve. No doubt he has the same already and I judge that you told him to ship the same to headquarters. It is question in my mind that same will be granted, because of just raising hay on the place. They generally want grain and barley with hay, also vegetables and other produce raised, dairy, etc. Then also when just raising hay they know that unless one has cattle to feed there is no market to get the price for

(Testimony of Mr. Edgar Sadler.)

hay. Judging from the report signed it shows very little progress being made in the ten years since the ranch was supposed to be bought. Because they make inquiry and know from the banks that interest, taxes and expenses is all the ranch has been paying. The report shows that about 1000 tons of hay is raised and cut each year. The average price per ton of \$7, thus showing that the income from the ranch is \$7000 per year. Now the taxes each year is about \$750. The interest [419] each year on money borrowed about \$1000. Expenses for hired help or labor \$1000. Now \$1000 plus \$1000 plus \$750 equals \$2750. Improvements per year \$1000, \$3750; Farming Implements \$300, \$4050. Nothing shown of any reseeding cost. Of course, if they have money to loan out, the same might be granted and no doubt it will take about three or four months before you will hear from them. They will naturally send three different men to look the same over and make report on the same. I signed the same and returned it to Mr. Castle, so I guess that he will send it or give it to the Federal Bank Reserve party in Elko.

“My folks are all pretty fair and trying to get along as conditions and circumstances will permit.

“I hope that you and your family are all enjoying fair health.

“The weather down here is still cold and

(Testimony of Mr. Edgar Sadler.)

frost are noticed every few mornings so that things are not growing very much. It is hard to say now the condition about water around here as we have been getting some snow in the mountains.

“With love to all from us all.

“Your Brother,

“ALFRED.”

Q. Mr. Sadler, I show you what purports to be a mortgage dated [420] February 17, 1927, between Edgar Sadler and Ethel Sadler, his wife and Alfred and Kathryn Sadler, his wife, as mortgagors, and First National Bank of Winnemucca and Farmers & Merchants National Bank of Eureka as mortgagees. You have seen that instrument before, have you? A. Yes, sir.

Q. You signed it, did you?

A. I signed it.

Q. That is your signature on the bottom?

A. Yes.

Q. And that is the signature of Alfred Sadler?

A. Yes, sir.

Q. And Ethel Sadler and Kathryn Sadler?

A. Yes, sir.

Mr. Cooke: We offer this document in evidence.

(Mr. Springmeyer present.)

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit “R.”

(Testimony of Mr. Edgar Sadler.)

Q. I show you what purports to be mortgage dated March 28, 1929, between Edgar Sadler, a resident of Ramona, Eureka County, as mortgagor, and Farmers & Merchants National Bank of Eureka as mortgagee, and ask if that is your signature on the second page? A. Yes, sir.

Q. You recollect executing the document, do you? A. Yes, sir. [421]

Mr. Cooke: We offer it in evidence.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit "S."

Mr. Cooke: For the further information of the Court, exhibit "R" is mortgage dated the 7th of February, 1927, by Edgar and Ethel Sadler and Alfred and Kathryn Sadler to First National Bank of Winnemucca and Farmers & Merchants Bank of Eureka, and the principal sum secured is ten thousand dollars by two promissory notes, the notes being signed by the same mortgagors of it, and then a description of this Diamond Valley Ranch property, water-rights, etc., and included—this is a real and chattel mortgage combined—included in the mortgage are 300 cattle branded quarter circle on the right hip and 50 calves earmarked a certain marking of the ear, 350 ewes branded quarter circle, 105 weaners and 6 bucks, and then it goes on in more or less conventional form of bank mortgages, what the mortgagor has to do, and it is recorded, acknowledged by all the parties and certified by the notary public certificate annexed under the old law, and recorded April 4, 1927.

(Testimony of Mr. Edgar Sadler.)

Exhibit "S" is a mortgage executed—it doesn't say on its face, but it is a chattel mortgage executed by Edgar Sadler to secure the principal sum of \$2700. It is stated that the principal sum is \$27.00. That is a mistake, but it is for \$2700.00.

Q. Mr. Sadler, I notice this Exhibit "S," the mortgage that you signed, states that you are indebted in the sum of \$2700 and then it states down here the principal sum is \$27.00. Which was [422] the correct amount? A. \$2700.

Mr. Cooke: That the Farmers & Merchants National Bank of Eureka is the mortgagee and the property mortgaged is 380 head of cattle branded two half circles on the right hip and earmarked certain mark on the right ear, and that is acknowledged by Edgar Sadler and certified by the Notary and recorded March 28, 1929, in Book C, Title Mortgages, page 485, Eureka County records.

Q. Mr. Sadler, I show you another document designated mortgage, dated August 4, 1930, between Edgar Sadler, Ethel Sadler, his wife, and Reinhold Sadler, residents of Eureka, Eureka County, State of Nevada, as mortgagors, and Farmers & Merchants National Bank of Eureka mortgagee, and ask you if you know what that document is and if you signed it. That is a copy. Did you sign the original of that mortgage that you recall about that time, August 4th, to secure the sum of \$10,100? A. Yes, sir.

Q. And this copy indicates that it was signed by you and your wife, Ethel Sadler, and Reinhold Sadler? A. Yes, sir.

(Testimony of Mr. Edgar Sadler.)

Q. And it covers certain head of cattle that are there described.

Mr. Cooke: We offer the copy in evidence. This was secured from the recorder up there.

Mr. Thompson: In Eureka County? [423]

Mr. Cooke: Yes, that is one he prepared for us from his records.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit "T."

Mr. Cooke: Exhibit "T," as previously stated, is mortgage made by Edgar Sadler, Ethel Sadler, and Reinhold Sadler, mortgagors, to the Farmers & Merchants National Bank, Eureka, to secure in the sum of \$10,100, with interest, etc., interest being 8%, and the property mortgaged consists of 600 head of cattle, some branded two half circles on the right hip and slit in right ear, some branded T E connected on the left hip, and the original is recorded on August 4, 1930, in Book C, Title Mortgages, records of Eureka County. Endorsed upon the document is the following: "I hereby certify that this mortgage has been fully paid, satisfied and discharged. Farmers & Merchants National Bank, Eureka, Nevada, by C. L. Tobin, cashier. Dated October 31, 1936."

Q. You have a document dated December 27, 1932, copy of document I should say, signed Edgar Sadler, Ethel Sadler and Reinhold Sadler, and purporting to be a mortgage. Did you examine that document?

A. Yes, sir.

(Testimony of Mr. Edgar Sadler.)

Q. Do you remember anything about you and the other parties executing the original of that?

A. Yes, sir.

Q. That is for money that you borrowed from the bank? [424]

A. Yes, sir.

Mr. Cooke: We offer it in evidence.

Mr. Thompson: Who prepared this copy?

Mr. Cooke: The clerk, was under his direction; I couldn't say further than that.

Mr. Thompson: No objection.

The Court: It may be admitted as Defendant's Exhibit "U."

Mr. Cooke: Defendant's Exhibit "U" is a copy of mortgage executed by Edgar Sadler, Ethel Sadler, and Reinhold Sadler, as mortgagors to the Regional Agricultural Credit Corporation, Salt Lake City, Utah, and secured by note in the principal sum of nine thousand dollars with interest, and is a chattel mortgage on 70 steers, Hereford yearlings, 67 Hereford yearlings, 294 cows, Hereford, two to eight years old, 54 calves, Hereford, 9 bulls Hereford, cattle branded quarter circle on the right hip and ear marked with slit on the right ear or T E on the left hip and ear marked with drop and upperbit in right ear and underbit in left ear, and 30 horses branded half circle "S," and also some 90 tons of hay now on the ranch. This is recorded in Book C, title Mortgages, page 291 Records of Eureka County, Nevada, on January 9, 1933.

(Testimony of Mr. Edgar Sadler.)

Q. Mr. Sadler, I have handed to you—have you examined that? A. Yes, sir.

Q. ———what appears to be a mortgage executed by Edgar Sadler, Ethel Sadler, Reinhold and Verna Sadler, to the Regional Credit [425] Corporation. Are you familiar with the original of that document? A. Yes, sir.

Q. Who is Verna Sadler?

A. Reinhold Sadler's wife.

Mr. Thompson: What is the date of that, Mr. Cooke?

Mr. Cooke: It is dated—it says, “first above written” and there doesn't appear to be any “first above written” that I can locate, but the acknowledgment and affidavit is dated February 9, 1934. There are two or three acknowledgments on it but they appear to be all dated about the same time. We offer it in evidence.

Mr. Thompson: Did Mr. Sadler testify that this is a copy of the original which they executed at that time?

Mr. Cooke: I don't know as he precisely answered that way. I can ask him.

Q. I will ask you, Mr. Sadler, the document I last showed you made to the Regional Agricultural Credit Corporation as mortgagee and yourself and wife Ethel and Reinhold and Verna Sadler as mortgagors, in the sum of \$12,900, and it is dated, according to the acknowledgments along in about the 9th of February, 1934, do you remember executing the original of that document? A. Yes, sir.

(Testimony of Mr. Edgar Sadler.)

Q. That is a copy of it? A. Yes, sir.

Q. As far as you know it is a correct copy?

A. Yes, sir.

Mr. Thompson: We have no objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit "V."

Mr. Cooke: Exhibit "V," as already stated, is mortgage by the parties named to secure \$12,900 with the Regional Agricultural Credit Corporation of Salt Lake City, and it mortgages 40 steers, Hereford yearlings, 70 steers Hereford 2-year-olds, 25 heifers, Hereford yearlings, 60 Hereford heifers, year old, 286 cows, Hereford, 206 calves Hereford, 12 bulls, Hereford registered, and also livestock purchased from the proceeds of the loan, 30 horses and 900 tons of hay, etc. It appears to have been record in Book C of Title Mortgages at page 372.

Q. The document which you now hold in your hand, what is that, Mr. Sadler?

A. That is a commissioner's loan, I think.

Q. Do you recalling signing the document?

A. Yes, sir.

Q. And the other signatures are Ethel Sadler and Alfred Sadler and Kathryn Sadler?

A. Yes, sir.

Q. They are the signatures of the persons named? A. Yes, sir.

Q. On the face of it there appears to be some lead pencil markings, do you know anything about that? A. No, I do not. [427]

(Testimony of Mr. Edgar Sadler.)

Mr. Cooke: I offer it in evidence.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit "W."

Mr. Cooke: Defendant's Exhibit "W" is a mortgage to the so-called Land Bank, Commissioner deed of trust, dated September 28, 1936, and is secured by the real property described as 3120 acres more or less. The principal sum is \$4300, subject to an existing Federal Land Bank encumbrance. It is recorded at the request of W. A. Rankin November 12, 1936, in Book G of Mortgages, page 84.

Q. Who was Mr. W. A. Rankin, do you know, Mr. Sadler?

A. He was connected with the Federal Land Bank in Elko.

Q. I show you a photostat of what appears to be a State of Nevada Land Commissioner's deed of trust. Did you examine that? A. Yes.

Q. Do you recall anything about executing the original? A. Yes, sir.

Mr. Thompson: What is the date of that, please?

Mr. Cooke: 15th of April, 1937.

Q. Do you recall that your wife and Alfred Sadler and his wife signed it also?

A. Yes, sir.

Mr. Cooke: We offer the photostat in evidence.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit "X."

(Testimony of Mr. Edgar Sadler.)

Mr. Cooke: Defendant's Exhibit "X" is a mortgage land bank commissioner deed of trust, dated April 15, 1937, and describes the Diamond Valley Ranch, 3120 acres more or less, subject to an existing Federal Land Bank encumbrance, and apparently has the conventional provisions and it is recorded May 11, 1937, in Book G of mortgages, page 96, of Eureka County records. Attached to the exhibit is a deed of reconveyance by the trustee Walter C. Dean, of the property described in the deed of trust. That is dated January 31, 1942.

The Court: Who executed the deed of trust mortgage?

A. Edgar A. Sadler, also known as Edgar Sadler, and Ethel Sadler, his wife, Alfred Sadler and Kathryn Sadler.

Q. Have you looked at the document I handed you a while ago? A. Yes, sir.

Q. That appears to be a photostat of release of a chattel mortgage? A. Yes, sir.

Q. And annexed to it is a livestock chattel mortgage, or at least a photostat of livestock chattel mortgage, dated April 15, 1937, by yourself, Edgar A. Sadler, Ethel Sadler, Reinhold Sadler and Verna Sadler. Do you remember executing the original of that chattel mortgage? A. Yes, sir.

Q. And it has been released as indicated by the photostat of the release? [429] A. Yes, sir.

Mr. Cooke: We offer the document in evidence.

Mr. Thompson: No objection, your Honor.

(Testimony of Mr. Edgar Sadler.)

The Court: It may be admitted as Defendant's Exhibit "Y."

Mr. Cooke: Defendant's Exhibit "Y" is release of a chattel mortgage annexed to a livestock chattel mortgage, dated April 15, 1937, which was given for security in the sum of \$4200, payable in installments, and it is secured by 60 head of steers, mixed breed, 132 steers, mixed breed, 74 heifers, mixed, 71 heifers, mixed, 300 cows, mixed, 31 cows, mixed, 222 calves, mixed, 12 bulls registered Hereford, and 12 unclassified, and then it gives the brand, T E on the left hip or quarter circle on the right hip and ear marks. Also 22 work horses and 6 saddle horses and 800 tons of hay.

Q. Now, Mr. Sadler, in this instrument that I read from, you note that the breed is described as mixed. What were the different breeds that you had there? A. Hereford——

Q. Some Hereford, were there?

A. Yes, sir.

Q. And what were the others?

A. Durham.

Q. And anything else? They were all Hereford and Durham? A. Yes, mostly Hereford.

The Court: Who executed that instrument?

Mr. Cooke: Edgar and Ethel Sadler, his wife, and Reinhold and Verna Sadler, his wife.

Q. You have a photostat of the release of chattel mortgage dated September 28, 1936, and annexed to that photostat of a so-called livestock, crop and chattel mortgage, is that right? A. Yes, sir.

(Testimony of Mr. Edgar Sadler.)

Q. That includes a number of cattle and some horses and hay and it is made by Edgar A. Sadler, Ethel Sadler, Reinhold Sadler and Verna Sadler, is that right? A. Yes, sir.

Mr. Cooke: I offer it in evidence.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted in evidence as Exhibit "Z."

Mr. Cooke: Exhibit "Z" is a photostat of a chattel mortgage made by Edgar A. Sadler, also known as Edgar Sadler, and Ethel Sadler, his wife, and Reinhold Sadler and Verna Sadler, his wife, on September 18, 1936, to the Land Bank Commissioner, and annexed to it is a release of the same chattel mortgage as part of the same exhibit, the chattel mortgage being for the principal sum of \$4300, payable in installments, and refers to a mortgage already on the property of \$13,544, and the chattel mortgage is secured by 68 steers, mixed, 132 steers, mixed, 74 heifers, mixed, 300 cows, mixed, 31 cows, mixed, 222 calves, mixed, 15 bulls, registered Hereford, 12 unclassified, and also giving their ages and branded T E on the left hip or quarter circle on the right hip, [431] and gives ear marks and includes 22 work horses, 6 saddle horses, and 800 tons of hay in the stack, the horses being branded quarter circle "S" on the right shoulder.

Q. Have you looked over the document I handed you? A. Yes, sir.

Q. With reference to the exhibit that I just referred to, to the part that refers to mixed stock,

(Testimony of Mr. Edgar Sadler.)

would your same answer apply to that as to the previous exhibit? A. Yes.

Q. This document which I just handed you and which you have examined, appears to be dated June 4, 1938, and purports to be made by you and Ethel Sadler and Reinhold Sadler and Verna Sadler, mortgagors to the Land Bank Commissioner. Do you recall anything about the execution of the original of that mortgage? A. Yes, sir.

Q. You did join with the other persons in signing the original mortgage, did you?

A. Yes, sir.

Mr. Cooke: We offer the document in evidence.

The Court: Just who executed that mortgage?

Mr. Cooke: Executed by Edgar A. Sadler, also known as Edgar Sadler, and Ethel Sadler, his wife, and Reinhold Sadler and Verna Sadler.

Mr. Thompson: No objection, your Honor.

The Court: It will be admitted as Defendant's Exhibit "A-1." [432]

Mr. Cooke: Defendant's Exhibit "A-1" is a chattel mortgage—the word "crop" seems to have been stricken—made by Edward Sadler, Ethel Sadler, Reinhold Sadler and Verna Sadler, and is acknowledged before a notary public by the mortgagors on June 4, 1938, filed under the new law on June 4, 1938, according to the endorsement, and secured by a number of installments averaging in the neighborhood of \$300 each, with interest at 5%.

Q. You have what appears to be a photostat of some document in your hand? A. Yes, sir.

(Testimony of Mr. Edgar Sadler.)

Q. Do you know anything about obtaining the original of the document of the photostats signed by the various persons on behalf of the Federal Land Mortgage Corporation on behalf of the Federal Land Bank of Berkeley and they purport to state release of property and chattel mortgage?

A. Yes.

Q. Were those releases obtained by you or through your efforts or with your knowledge?

A. Yes, sir.

Q. You know of the fact that the mortgages were paid off? A. They were.

Mr. Cooke: We offer them in evidence as one exhibit.

Mr. Thompson: Could you tell us which mortgages these released?

Mr. Cooke: I couldn't without checking with the defendants, [433] Mr. Thompson. I haven't those figures immediately available.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted in evidence as Defendant's Exhibit B-1.

Mr. Cooke: Defendant's Exhibit "B-1" is photostat of the releases of a chattel mortgage executed by Edgar Sadler, Ethel Sadler, Reinhold Sadler and Verna Sadler, in favor of the Land Bank Commissioner on June 4, 1938, the release being dated June 21, 1938, and it is acknowledged on the 21st of June, 1938, by the officials of the Federal Land Bank of Berkeley, the first one. The second one is a release of a crop and chattel mortgage, dated

(Testimony of Mr. Edgar Sadler.)

June 4, 1938, the release being dated June 21, 1938, executed on behalf of the Federal Land Bank of Berkeley. The first one on behalf of the Federal Farm Mortgage Corporation by the Federal Land Bank of Berkeley, and then follows the acknowledgment of the officers before a notary. Apparently not filed for record.

Q. You have a photostat there in your hand, Mr. Sadler? A. Yes, sir.

Q. Did you examine the document I handed you? A. Yes, sir.

Q. That purports to be an original, a crop and chattel mortgage with the word "crop" stricken out, is that right? A. Yes, sir. [434]

Q. Do you know anything about the execution of the original of that document? A. Yes, sir.

Q. That is money that was owing for the ranch, operations of the ranch, by the parties named?

A. Yes, sir.

Mr. Cooke: We offer it in evidence.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit "C-1."

Mr. Cooke: Exhibit "C-1" is chattel mortgage by Edgar A. Sadler, also known as Edgar Sadler, Ethel Sadler, his wife, Reinhold Sadler and Verna Sadler, his wife, of certain personal property located on the property, 3120 acres described in some other document, presumably the Diamond Valley Ranch, although that is not stated in this document, and the property mortgaged is 37 one-

(Testimony of Mr. Edgar Sadler.)

year-old Hereford steers, 50 one-year-old Hereford heifers, 53 two-year-old Hereford heifers, 340 cows, Hereford, 12 cows, Hereford, over 8 years, 58 Hereford calves, 11 Hereford bulls, grade, 74 Hereford weaner heifers, 77 Hereford weaner steers, 710 total, all branded quarter circle on the right hip and/or T E on the left hip, and including all right, title and interest in and to the range, range allotments, range rights, various permits, etc., and then follows quite a number of items of buildings, corals and the like. The mortgage being given to secure promissory note dated May 1, 1928, for the principal sum of \$13,000, bearing interest at the rate of 5% per annum, and it is also given to secure payment of a separate note dated April 15, 1937, for the principal sum of \$4200, with interest at the rate of 5% per annum, that note being described in the deed of trust given to the Land Commissioner, dated April 15, 1937, and referring to the records and signed Edgar A. Sadler, Ethel Sadler, Reinhold Sadler and Verna Sadler by acknowledgement before a notary and filed for record at the request of blank, 8-9-1938, and recorded in book blank and then written in the blank line is the word, "Entry 22609."

Q. The document you handed me just now, did you examine that? A. Yes, sir.

Q. And that is certified copy of mortgage, chattel and crops, executed by Edgar Sadler, Ethel Sadler, Reinhold Sadler and Verna Sadler?

A. Yes, sir.

(Testimony of Mr. Edgar Sadler.)

Q. You recall the execution of that document, do you? A. Yes, sir.

Q. Signing it yourself and the other parties?

A. Yes, sir.

Mr. Cooke: We offer it in evidence. It is a certified copy.

Mr. Thompson: I have no objection, your Honor.

The Court: That is Exhibit "D-1," admitted in evidence. [436]

Mr. Cooke: Exhibit "D-1" is a certified copy of a mortgage of chattels and crops from Edgar A. Sadler and Ethel Sadler, his wife, and Reinhold Sadler and Verna Sadler, his wife, to the Bank of America Credit Corporation, dated January 15, 1941, and is made as security for promissory notes aggregating \$11,480.80, with interest at 4½%, payable on demand, and is filed at the request of C. H. Knox on January 30, 1941.

Q. Can you make out from that fine print what the original of that document was?

A. Yes, sir.

Q. And do you recall about the execution of it?

A. Yes, sir.

Q. And the occasion when it was signed?

A. Yes, sir.

Q. And delivered? A. Yes, sir.

Q. That purports to be signed by yourself, Ethel Sadler, your wife, and Alfred Sadler and Kathryn Sadler, his wife? A. Yes, sir.

(Testimony of Mr. Edgar Sadler.)

Mr. Cooke: We offer the photostat in evidence. It is very fine print, but it was offered to us in that form and we can't do any better with it.

Mr. Thompson: No objection, your Honor. [437]

The Court: It may be admitted as Defendant's Exhibit "E-1."

Mr. Cooke: Defendant's Exhibit "E-1" is designated as Federal Farm Loan Amortization deed of trust, dated May 1, 1928, signed by Edgar Sadler and Ethel Sadler, his wife, and Alfred Sadler and Kathryn Sadler, his wife, as mortgagors and Willard D. Ellis, A. M. Morten and Sims Ely as trustee and Federal Land Bank of Berkeley, a corporation, as beneficiary, and it appears to be executed and to describe the land known as the Diamond Valley Ranch, approximately 3120 acres, including the Big Shipley Springs, and all dams and ditches and waterways and so on, and is given as security for the principal sum of promissory note dated May 1, 1928, in the sum of \$13,000, with interest at the rate of 5%, and principal payable in 72 consecutive semi-annual installments, and it is acknowledged in the regular form by the mortgagors and recorded at the request of Edgar Sadler on October 22, 1928, in Book F of Mortgages at page 400, Eureka County Records.

We offer in evidence certified copy of deed from Reinhold Sadler and Louisa Sadler to the Diamond Valley Live Stock and Land Company, dated April 25, 1885, and recorded May 26, 1886, in Libre 11 of

(Testimony of Mr. Edgar Sadler.)

Deeds, page 504, records of Eureka County, Nevada. It is attached to the notice of motion to amend paragraph 2 of our answer.

Mr. Thompson: No objection, your Honor.

The Court: That will be admitted in evidence as Defendant's Exhibit "F-1." [438]

DEFENDANT'S EXHIBIT F-1

Reinhold Sadler, Louisa Sadler to Diamond Valley Live Stock and Land Company.

This indenture, made the Twenty-fifth day of May in the Year of our Lord One Thousand eight hundred and Eighty five. Between Reinhold Sadler and Louisa Sadler his wife of the Town and County of Eureka, State of Nevada, the parties of the first part and the "Diamond Valley Live Stock and Land Company" a corporation duly organized and existing under the laws of the State of Nevada, the party of the Second part.

Witnesseth:

That the said parties of the first part for and in consideration of the sum of Fifteen Thousand (\$15,000), Dollars gold coin of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged do by these presents grant, bargain, sell and convey unto the said party of the second part and to its successors and assigns all of their right title and interest, both in law and equity in

(Testimony of Mr. Edgar Sadler.)

and to the following described property situated in the said County of Eureka and State of Nevada, described as follows, to-wit, First the South West Quarter of the South West Quarter of Section Eighteen and the North Half of the North West Quarter and the south west quarter of the South West Quarter of Section Nineteen, all in Township Twenty four North, Range Fifty-three East. Mount Diablo Base and Meridian, containing One Hundred and Sixty acres. Second the East half of the South East Quarter of Section Twenty three and the North West Quarter and the South East Quarter of the South West Quarter of Section Twenty Four also the North Half of Section Twenty four all in Township Twenty four North Range Fifty two East, Mount Diablo Base and Meridian containing Four Hundred and Eighty acres. Third the East of the North West Quarter. The East Half of the South West Quarter. The West Half of the North East Quarter. The West Half of the South East Quarter, and Lot Four, all in Section Nineteen, Township, Twenty-Four North Range Fifty-three East containing Three Hundred and Fifty Six and $17/100$ acres, and being Desert Land Entry No. 206. Fourth. The North East Quarter of the North West Quarter and the West Half and South East Quarter of the North East Quarter of Section Twenty-five, Township Twenty four North Range Fifty Two East Mount Diablo Base and Meridian containing One Hundred and Sixty acres. Fifth. The South Half of the South

(Testimony of Mr. Edgar Sadler.)

Half of Section Twenty four and the North East Quarter of the North East Quarter of Section Twenty five all in Township Twenty Four North Range Fifty two East also North West Quarter of the North West Quarter and the South West Quarter of the North West Quarter of Section Thirty Township Twenty four North Range Fifty Three East, all Mount Diablo Base and Meridian containing Two Hundred and seventy two and $61/100$ acres. Sixth. The South East Quarter of the North West Quarter and the South Half of the North East Quarter of Section Thirty, also the South West Quarter of the North West Quarter of Section Twenty Nine all in Township Twenty four North Range Fifty three East Mount Diablo Base and Meridian containing One Hundred and Sixty acres. Seventh. Lot Four of Section Eighteen and lots, one, two and three of Section Nineteen all in Township Twenty four North Range Fifty three East, also the South East Quarter of the South East Quarter of Section 13 and the North East Quarter of Section Twenty four and the East half of the North West Quarter. The North Half of the South East Quarter and the North Half of the South West Quarter of Section Twenty four and the North East Quarter of the south East Quarter of Section Twenty three all in Township Twenty four North, Range Fifty-Two East, all Mount Diablo Base and Meridian containing Six Hundred and twenty three and $32/100$ acres. Eight. The South East Quarter

(Testimony of Mr. Edgar Sadler.)

of the South West Quarter and the South Half of the South East quarter of Section Eighteen, also the South West Quarter of the South West Quarter of Section Seventeen Township Twenty Four North, Range Fifty three East Mount Diablo Base and Meridian containing One hundred and sixty acres. Together with all possessory right title and interest to all lands claimed, owned or possessed by the said parties of the first part in Diamond Valley, Eureka County Nevada, and also the Stock Ranges incident thereto. Together with all water rights, water ditches, dams, flumes and reservoir incident or appurtenant to said lands and usually had and used thereon for irrigating purposes. Together with all and singular tenements hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part its successors and assigns forever.

In Witness Whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

REINHOLD SADLER [Seal]

LOUISA SADLER [Seal]

(Testimony of Mr. Edgar Sadler.)

State of Nevada,
County of Eureka—ss.

On this 25th day of May A. D. 1885 before me Benj. C. Levy a Notary Public in and for said County personally appeared Reinhold Sadler and Louis Sadler his wife personally known to me to be the individuals described in and who executed the annexed instrument as parties thereto and acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned. And the said Louis Sadler wife of the said Reinhold Sadler having been by me first made acquainted with the contents of said instrument, acknowledged to me upon examination apart from and without the hearing of her husband that she executed the same freely and voluntarily without fear or compulsion or under influence of her husband and that she did not wish to retract the execution of the same.

In Witness whereof I have herewith set my hand affixed my official seal the day and year first above written.

[Seal]

BENJ. C. LEVY

Notary Public in and for Eureka County, Nevada.

Recorded May 26th, 1886 at 45 minutes past 12 M. in Liber 11 of Deeds, Page 504, Records of Eureka County, Nevada.

W. S. BEARD,
Recorder.

(Testimony of Mr. Edgar Sadler.)

State of Nevada,
County of Eureka—ss.

I, Peter Merialdo, County Recorder and ex-officio Auditor, in and for said County, do hereby certify that the above and foregoing in a true and correct copy of the original matter thereof, Deed from Reinhold Sadler, Louisa Sadler to Diamond Valley Live Stock and Land Company which now remains of Record in my office at Eureka, County and State aforesaid.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the Town of Eureka, this 11th day of September A. D. 1946.

[Seal] /s/ PETER MERIALDO,
County Recorder.

By
Deputy Recorder.

[Endorsed]: No. 371. U. S. Dist. Court, Nevada. Deft's Exhibit No. 1 on Motion to Amend Answer. Filed Sept. 17, 1946. Amos P. Dickey, Clerk. By O. F. Pratt, Deputy. No. 371. U. S. Dist. Court, District of Nevada. Deft's. Exhibit No. F-1. Filed Oct. 21, 1946. Amos P. Dickey, Clerk. By O. F. Pratt, Deputy.

Mr. Cooke: Defendant's Exhibit "F-1" is a certified copy of a deed dated May 25, 1885, executed by Heinhold Sadler and Louisa Sadler, his wife, to

(Testimony of Mr. Edgar Sadler.)

the Diamond Valley Livestock & Land Company, a corporation, for consideration of \$15,000, and contains detailed description of lands conveyed and refers to the land in Diamond Valley, Eureka County. We ask that the document designated as Exhibit 1 on the motion to amend the answer, filed September 26, 1946, be withdrawn from the pleading, so it may be offered in evidence as an exhibit.

The Court: There is no objection to that?

Mr. Thompson: No objection.

The Court: Motion will be granted.

Mr. Cooke: That includes flumes and reservoirs and water rights, range rights, and is recorded on May 26, 1886, Libre 11 of Deeds, page 504, Records of Eureka County.

The Court: That was admitted as Exhibit F-1.

Q. I handed you what appears to be a photostat of a chattel mortgage made by Edgar A. Sadler, Ethel Sadler, his wife, and Reinhold Sadler and Verna Sadler on the 13th day of July, 1938. Do you remember anything about the execution of that document, Mr. Sadler? A. Yes sir.

Mr. Thompson: We already have one. C-1 is dated July 13, 1938.

Mr. Cooke: Well, I wasn't too sure about this one. No [439] use putting both of them in. I think we already have it, Exhibit C-1.

Q. The document that I handed you and which you just examined purports to be a copy of a chattel mortgage made by Edgar Sadler and Ethel Sadler, Reinhold Sadler and Verna Sadler, to the Regional

(Testimony of Mr. Edgar Sadler.)

Agricultural Credit Corporation, in the principal sum of \$12,374.25. Do you remember anything about executing and delivering that document?

A. Yes sir.

Q. You signed it and your wife signed it and Reinhold Sadler and his wife signed?

A. Yes sir.

Mr. Cooke: We offer the document in evidence.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit "G-1."

Mr. Cooke: Defendant's Exhibit G-1 is copy of chattel mortgage made by Edgar Sadler and his wife and Reinhold Sadler and Verna Sadler, his wife, in consideration of \$12,374.25, to the Regional Agricultural Credit Corporation of Salt Lake City, mortgagee. It mortgages the following described livestock. (Reads description). This mortgage is given as additional and supplemental security and is not intended to supersede or displace certain chattel mortgages executed by Edgar Sadler, Ethel Sadler, Reinhold Sadler and Verna Sadler to the mortgagees herein, dated January 13, 1934, January 19, 1936, and March 2, 1937, [440] and includes all the increase, and more or less the conventional mortgage covenants. The promissory note mentioned in the mortgage is for the principal sum of \$13,544 and it is recited that the chattel mortgage is made to secure that note, and so on. Then it is provided for a number of installments and for further loans and advances being optional with the

(Testimony of Mr. Edgar Sadler.)

mortgagee, but in any event not to exceed the aggregate of 50 thousand dollars. Then follows provisions in regard to the operation and the care of the stock, and it is filed for record on February 5, 1938, file No. 22358.

Q. I just handed you a document, Mr. Sadler, designated mortgage of chattels, livestock form. Do you remember anything about the execution of that document? A. Yes sir.

Q. It appears to be made by yourself and your wife and Reinhold Sadler and Verna Sadler, his wife, on January 7, 1938. This is certified as a true copy of the original. You recall about the original, do you? A. Yes.

Mr. Cooke: We offer the document in evidence.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit "H-1."

Mr. Cooke: Defendant's Exhibit "H-1", dated January 7, 1938, made by Edgar A. Sadler, Ethel Sadler, Reinhold Sadler and Verna Sadler, purports to be a chattel mortgage as security for [441] the principal sum of \$18,280. It is acknowledged in the regular form and it is filed, file No. 22455, at the request of C. H. Knox, May 31, 1938, and it covers the following: (Reads description of livestock).

Q. The document that I show you, that you just now handed me, you have examined that, have you?

A. Yes sir.

(Testimony of Mr. Edgar Sadler.)

Q. It appears to be a copy of a chattel mortgage dated March 2, 1937, signed by you and your wife and Reinhold Sadler and his wife, Verna Sadler. Do you remember about the execution of that document? A. Yes sir.

Q. And the transaction of what it was for, and so on? A. Yes sir.

Mr. Cooke: We offer the document in evidence.

Mr. Thompson: No objection, your Honor.

The Court: It may be admitted as Defendant's Exhibit "I-1."

Mr. Cooke: Defendant's Exhibit "I-1" is chattel mortgage from Edgar Sadler, Ethel Sadler, Reinhold Sadler and Verna Sadler, and is dated, as already stated, March 2, 1937, is a chattel mortgage to secure, at least the introductory part recites consideration of \$10,891.24, but the notes sets out, and in which it is stated, that it is to secure note in the sum of \$13,544, the note being dated January 19, 1936, the mortgagee being the Regional Agricultural Credit Corporation of Salt Lake City and the livestock [442] being mortgaged is described as follows: (Reads description of livestock). The document was filed for record on March 24, 1937, file No. 21932.

The Court: We will take our recess until 2:00 o'clock this afternoon.

(Recess taken at 12:00 noon.)

Afternoon Session, October 21, 1946, 2:00 p.m.

MR. EDGAR SADLER

resumed the stand on further

Direct Examination

By Mr. Cooke:

Q. This morning, Mr. Sadler, you identified letter that Alfred had written to you, dated April 15, 1928. It is marked Defendant's Exhibit "Q." In that letter Alfred makes certain statements in regard to expenses, the ranch hadn't been paying and the amount of hay raised and cut each year. Do you remember about that letter? I will show it to you. A. Yes, I remember that.

Q. Where was Alfred when that letter was written? A. I guess he was in Reno here.

Q. Do you notice the envelope attached to the letter? A. Reno, yes.

Q. Postmarked Reno? A. Yes.

Q. Now about how often, from March 2, 1918, down to April 13, 1928, [443] was Alfred on the ranch?

A. I don't think he was out there more than a couple of times.

Q. A couple of times during that ten-year period? A. Yes.

Q. That is your best recollection, he was out there a couple of times? A. Yes.

Q. And about how long would he stay on those occasions?

A. Oh, two or three days, something like that, a week.

(Testimony of Edgar Sadler.)

Q. On those occasions how would he spend his time?

A. Oh well, he would go out hunting, run around the ranch, and that's about all.

Q. And after April 13, 1928, down to the time he died in 1944, what is the fact as to about how often he visited the ranch?

A. Well, I think it was only a couple of times. I don't recall how many times he was there. It wasn't very many times he came up there.

Q. Now for instance we have Defendant's Exhibit "R," which is a mortgage made by yourself and wife and Alfred Sadler and his wife to the First National Bank of Winnemucca and Farmers & Merchants National Bank of Eureka, to secure the principal sum of \$5,000. You told us about that in your testimony this morning?

A. Yes sir.

Q. Do you remember what the circumstances or conditions at the ranch were that made it necessary to make that mortgage and get [444] that loan?

A. Yes sir.

Q. What were they?

A. Well, the Washoe County Bank wanted their money and I went to these people and got a loan from them.

Q. You were under a mortgage to the Washoe County Bank at that time?

A. Yes sir.

Q. Do you remember the amount of the mortgage to the Washoe County Bank at that time?

A. I don't exactly, no.

(Testimony of Edgar Sadler.)

Q. Are you able to say whether or not it was the same mortgage that was given on March 2, 1918, that was still running?

A. Yes, the same mortgage, but there was quite a bit of it paid off.

Q. But the Washoe County Bank wanted their money at that time? A. Yes.

Q. And it became necessary for you to do whatever you could do to raise money?

A. Yes sir.

Q. As to any threats of foreclosure or the like, was there anything of that sort?

A. No, I don't think so.

Q. Not in connection with that loan?

A. No. [445]

Q. What did you have to do towards getting money from these two banks?

A. Well, I went to talk to the cashier up there, Mr. Sheehan.

Q. Jerry Sheehan? A. Yes.

Q. Was anybody with you? A. No.

Q. You handled the thing yourself, alone?

A. Yes sir.

Q. And you arranged for the loan or got the assurance from them that you could have the loan?

A. Yes sir.

Q. Who caused the preparation of the document itself, who attended to that?

A. The bank.

Q. They filled it out? A. Yes.

(Testimony of Edgar Sadler.)

Q. And how did you contact Alfred Sadler to get his signature?

A. Sent it down here to sign.

The Court: What is the number of that exhibit, Mr. Cooke?

Mr. Cooke: Exhibit "R."

Q. And would Alfred then send it to you or to the bank?

A. Sent it to me and I sent it to the bank.

Q. Did you and your wife sign first and then Alfred Sadler signed afterward, was that the way?

A. Yes sir, we signed first.

Q. This mortgage was for ten thousand and the mortgage to the Washoe County Bank was for \$16,500 and then you said some payments had been made on that? A. Oh yes sir.

Q. Do you remember whether or not the amount, balance due on the Washoe County Bank mortgage was exactly ten thousand dollars or just how that was at the time this mortgage, Exhibit "R," was made?

A. Well, I couldn't state the exact amount right now, but whatever it was——

Q. I think I stated a moment ago this was for five thousand, but that is an error. There are two notes for five thousand each and the total principal is ten thousand. Well, you don't recall just how much of this ten thousand was necessary to wipe off the Washoe County Bank mortgage?

A. No, I don't.

(Testimony of Edgar Sadler.)

Q. You have no recollection, as I take it, as to the amount or the approximate amount? You can't give us any idea as to the amount due on the Washoe County Bank mortgage at that time?

A. Well, I think it was close to eight thousand dollars.

Q. How were you notified to pay that off, that the bank wanted the money, for you to pay it off, by letter or how were you notified?

A. By letter.

Q. You haven't that letter in your possession now? A. No. [447]

Q. If it is your best recollection that there was eight thousand dollars due to the Washoe County Bank on the mortgage, what, if you can state, was done with the other two thousand borrowed on this mortgage, Exhibit "R"?

A. Well, that would be used for the expenses on the ranch.

Q. Would you borrow any more than actually necessary for expenses?

A. No sir; because money was awfully hard to get.

Q. This is February 17, 1927. Do you remember anything about that year as to whether the winter there was unusually severe or not?

A. What winter was it?

Q. The year is February 17, 1927, is the date of the mortgage. Now I am asking you if you remember anything about that year, whether the winter was unusually severe on cattle, etc.?

A. It was a pretty hard winter.

(Testimony of Edgar Sadler.)

Q. All of your winters out there are pretty hard?
A. Most of them.

Q. How long do you have to feed?

A. From about the first of December to the first of April and one year we started in on the 13th of November and wound up in May some time.

Q. Is there such a thing as the stock running out all winter out there?

A. No, not our stock.

Q. Do they get any feed except the hay that you feed?
A. No sir. [448]

Q. And the average that would be some time in December, I think you said, down to what date in the spring?
A. First of April.

Q. And then they are turned out on the range?

A. Yes sir.

Q. Do you feed any of the cattle between the time you turn them out in the spring and the fall of the year when the winter sets in again? Do you have to feed during the summer at all?

A. No.

Q. They are out?
A. They are out.

Q. How much range did you have, pertaining to the Sadler ranch, the Diamond Valley Ranch?

A. You mean how many acres?

Q. Yes.

A. I couldn't say. They are run on public domain there for a radius of 50 miles.

Q. Under the Taylor Grazing Act?

A. Well, we are now.

(Testimony of Edgar Sadler.)

Q. You weren't at that time?

A. No sir. There was no Taylor Grazing Act then.

Q. You are right, my mistake. You say the cattle run on a tract of grazing country there about 50 miles in diameter?

A. Well, 50 miles all around.

Q. How many acres per head is required on the kind of grazing [449] land that you have out there?

A. On the outside?

Q. Yes, where you run these cattle. About how many acres would you figure necessary for each creature?

A. I couldn't tell you that.

Q. Did you ever figure on that?

A. No, never figured on that.

Q. As a livestock man, do you know what is supposed to be the general allowance, the number of acres, for one cow or one animal? It depends, of course, upon the kind of feed.

A. The kind of feed, yes.

Q. But I am talking about general kind of feed in that section of Nevada. You don't know?

A. No.

Q. You don't know how many acres you figure per cow?

A. No.

Q. The range there is substantially the same as the range in that general country, isn't that true?

A. Yes.

Q. How is the water in places? Do the cattle have to travel far?

A. Fair.

(Testimony of Edgar Sadler.)

Q. How many springs or watering places are there on this tract that you told us they graze a radius of 50 miles that you mentioned?

A. Well, there are three spings. [450]

Q. How far would the cattle ordinarily have to travel to get to water from where they would be grazing?

A. Well, some cattle would have to go six or eight or ten miles, but there are a few windmills in there that were put in there after that.

Q. They were put in about when, Mr. Sadler?

A. I don't know.

Q. They were put in by the government, were they not?

A. Yes, by the government.

Q. Have they been operating ever since?

A. Yes sir.

Q. So that makes it more convenient for the cattle to get water, they don't have to travel so far?

A. Yes.

Q. Now calling your attention to the mortgage made by you, that is Defendant's Exhibit "S," dated March 28, 1929, between Edgar Sadler, a resident of Roman, County of Eureka, to Merchants & Farmers National Bank of Eureka, do you remember seeing that this morning and testifying about it?

A. Yes sir.

Q. In the principal sum of \$2700. This was given about a year after the last mortgage, which is Exhibit "R," but given by you alone. Nobody else signed that mortgage. Do you remember anything about the occasion or circumstances or why that mortgage was made?

(Testimony of Edgar Sadler.)

A. Well, I needed the money and I went to the bank and got some [451] money from them.

Q. Was it the same practice also in regard to this document as you told us the other one, that they had it prepared and you signed on the dotted line, so to speak? A. Yes sir.

Q. I note that only you signed this mortgage. Do you know anything about the circumstances as to why the others did not join with you?

Mr. Thompson: Objected to, calls for conclusion of the witness, your Honor.

The Court: I do not think it is a conclusion. Objection will be overruled. You may answer the question.

(Question read.)

A. Well, I was just asked to sign myself and they didn't want anything else.

Q. This purports on its face to cover 250 head of cattle branded the interlocking half circle. Those were the cattle that were owned by you alone?

A. Yes sir.

Q. Reinhold Sadler, your son, hadn't come into the operation of the ranch or had any cattle as early as March 28, 1929?

A. Yes, he had cattle.

Q. But they, of course, were not mixed up with these? A. No.

Q. The same brand? [452]

A. No, not the same brand.

Q. Can you tell the court anything about what

(Testimony of Edgar Sadler.)

this money was used for? The loan is \$2700. Do you know why it was necessary for you to get that money?

A. Well. I had to pay expenses on the ranch, taxes.

Q. Yes, but was there any special thing about it that you recall, making it necessary for you to make a mortgage on the cattle? Do you recall anything special about it at all?

A. No, I don't think so.

Q. Well, where you borrow more or less odd amount like this, instead of 2500 or 3000 or the like, does that refresh your recollection in any way as to what you used that money for, or why you got it for that particular amount, \$2700?

A. No.

Q. Now with reference to the mortgage made August 4, 1930, between Edgar Sadler and Ethel Sadler and Reinhold Sadler and the Farmers & Merchants National Bank at Eureka, Defendant's Exhibit "T," that is in the principal sum of ten thousand dollars. Can you tell the court anything about what the circumstances were that caused you to make that mortgage?

A. Well, between us we were going to buy some more cattle.

Q. "Between us," what do you mean?

A. My wife and my son Reinhold and myself.

Q. Did you buy some more cattle with the money that you borrowed? [453]

A. Part of it, yes sir.

(Testimony of Edgar Sadler.)

Q. Do you remember how many you bought?

A. Yes sir, 100 head of cows and about 40 calves.

Q. From whom did you buy those cattle?

A. From Mr. Mead at Battle Mountain.

Q. And when you bought them you would take them down to this ranch and graze them there, would you?

A. Yes sir.

Q. In those cases would you rebrand them?

A. Yes sir.

Q. Brand them what?

A. Brand them with the two half circles.

Q. Do you remember how much of that ten thousand dollars was required to buy those 140 head of stock?

A. Well, we owed the bank a little and then the bank furnished the rest of the money to buy the cattle.

Q. You were already indebted to the bank?

A. Yes sir.

Q. And then you needed a certain amount of money for these cattle?

A. Yes sir.

Q. And the amount of the indebtedness, plus the amount that you had to pay for the cattle, did that absorb all of the ten thousand?

A. Yes sir.

Q. This mortgage is a mortgage on 600 head of cattle, some with [454] quarter circle brand of yours and some with the T E brand. Did that include any of the cattle belonging to Mrs. Sadler or that she bought?

A. It did sir.

(Testimony of Edgar Sadler.)

Q. You heard her testimony a few days ago?

A. She put her money up in it too.

Q. Do you know that circumstance of her getting some 23 or 24 hundred dollars from her mother's estate?

A. Yes sir.

Q. She put it in the cattle?

A. She put it in the cattle that we bought.

Q. That is in this same deal that you told us about?

A. Yes sir.

Q. Have you any knowledge upon which you could give us any sort of an estimate as to the number of cattle that were branded with the quarter circle brand of yours and the number branded with the TE brand that were covered by this mortgage? Do you know about how many cattle Reinhold had?

A. I couldn't exactly say how many he had.

Q. Did this mortgage include all of the quarter circle belonging to you?

A. Yes sir.

Q. And your wife's and this money that you have told us about?

A. Yes sir. [455]

Q. That is 600 head at that time?

A. That is with Reinhold's cattle too.

Q. I think I asked you this, but do you recall anything about the amount that was still owing the bank at the time you gave this mortgage you have just been talking about?

A. No, I couldn't recall that off-hand.

Q. Do you recall what particular mortgage was outstanding at that time, to what bank or institution?

A. The Farmers & Merchants Bank at Eureka.

(Testimony of Edgar Sadler.)

Q. The same bank that you got the new loan from? A. Yes.

Q. Now in regard to Defendant's Exhibit "U," that is a mortgage from Edgar Sadler, Ethel Sadler, Reinhold Sadler and Verna Sadler to the Regional Agricultural Credit Corporation, and it includes some 494 head of steers, heifers, cows, calves and bulls and some hay, etc., and it is in the principal sum of nine thousand dollars and it is dated the 27th day of December, 1932. Do you remember about that one? A. Yes sir.

Q. What do you remember about it, in regard to why it was made and why it was necessary to make it?

A. Well, the bank wanted their money.

Q. What bank are you talking about?

A. Farmers & Merchants Bank.

Q. That is the bank of Eureka? [456]

A. Yes. And we got that nine thousand dollars from the Regional bank, the RAC there as you call it, and then there was a balance of 40 odd hundred left which the bank held every year.

Q. See if I understand you. This mortgage that you gave to the RAC in the sum of nine thousand dollars, did that pay off the money that was owing to the Farmers & Merchants Bank at Eureka?

A. No sir.

Q. You are still indebted there?

A. Still indebted there. That only paid part of it.

Q. You were not able then, I take it, to get a cancellation, a satisfaction?

A. No not a cancellation.

(Testimony of Edgar Sadler.)

Q. This nine thousand dollars that you borrowed from the RAC, how much of that was used on the then existing mortgage to the Farmers & Merchants Bank at Eureka? A. All of it.

Q. And do I understand you then to say that there was a balance due to the Farmers & Merchants Bank of 42 or 43 hundred dollars?

A. Something like that.

Q. Did you make any effort to get the total amount, or was this all you could get?

A. I tried to get it all but the RAC wouldn't give it to us. It was an awful hard time to get what we did get. The banks were all closed and you couldn't get any money from anybody. It happened that I called the other people and got the loan of the [457] RAC. If we hadn't got that loan we would have been sunk, that's all. They would have foreclosed and taken the ranch.

Q. That is the Farmers & Merchants Bank?

A. Yes sir.

Q. Was that bank closed along with all the other banks at that time?

A. No sir, they never closed. They stayed open.

Q. But you were not able to get any further accommodations?

A. No, couldn't get a dollar.

Q. What is the average hay on that ranch?

A. Well different years, is sometimes 400, 500, 600.

(Testimony of Edgar Sadler.)

Q. Some of these mortgages refer to larger amounts. For instance the one I hold in my hand, which I have been interrogating you about, Exhibit "U," refers to 900 tons of hay. Is that some of the previous year's hay or how does that come up?

A. Well, some of the previous year's hay and some of the hay that we cut off of our lease, Mr. Eccles'; that is quite a hay country down there.

Q. How much hay do you get off the Eccles' land, approximately?

A. It varies. Some years a good crop, some years very little.

Q. Expressed in tons, about how much do you get on the average?

A. Oh, maybe about 300 ton, somewhere along there.

Q. And wherever we find in these mortgages hay is in the mortgage, it includes the hay grown on the so-called Diamond Valley Ranch and also hay grown on the Eccles Ranch? [458]

A. Yes sir, grown altogether.

Q. Referring to Defendant's Exhibit "W," which is a mortgage made to the Land and Bank Commissioner, dated September 28, 1936, by Edgar Sadler and Ethel Sadler, his wife, and Alfred Sadler and Kathryn Sadler, in the principal sum of \$4300, well, I was going to ask you if that mortgage, being in the sum of \$4300, had anything to do with the balance that you said was owing to the Farmers & Merchants Bank at Eureka, but I see

(Testimony of Edgar Sadler.)

it is four years later. Presumably hasn't any connection.

A. That is that \$4300?

Q. Yes.

A. That is the balance we owed the Farmers & Merchants Bank and they wanted to foreclose me out on that mortgage, so I rustled around and had a hard time to get that Commissioner's loan.

Q. Well, the mortgage that you gave the RACC dated, December 27, 1932, for nine thousand dollars, that was the one that you told us left 42 or 43 hundred dollars owing?

A. Yes.

Q. Is it a fact then that that 43 hundred remained owing at the bank?

A. Yes sir.

Q. From that time that balance remained owing, from that time down to the 20th of September, 1936?

A. Yes sir. [459]

Q. And then is when you gave this mortgage I just mentioned, this Exhibit "W"?

A. Yes, sir.

Q. For \$4300?

A. Yes, sir.

Q. Did you get any fresh money at all for the making of that mortgage for \$4300?

A. No, sir.

Q. That took up the old balance?

A. That took up the old balance.

Q. At that time do you recall how many, if any, mortgages were already on the property?

A. On the cattle you mean?

Q. Well, this is a deed of trust for real estate mortgage, this one.

(Testimony of Edgar Sadler.)

A. Well, that was RACC mortgage on the cattle.

Q. Now when you say RACC mortgage, I note this document here, Exhibit "W," recites that this mortgage is subject to an existing Federal Loan Bank encumbrance. Do you remember what existing Federal Land Bank encumbrance that referred to?

A. No.

Q. You say anyway there was a——

A. Oh, yes, the Federal Land Bank had the mortgage on the ranch.

Q. Before you gave this 43 hundred?

A. Oh, yes. [460]

Q. This \$4300 mortgage is also on the ranch?

A. No, it is on the cattle, I think.

Q. Well, look at it.

A. I thought it was on the cattle. That's right, it is on the ranch. They wanted a mortgage on the cattle too.

Q. How would they make these demands upon you for payment or security for the unpaid balance, by letter or oral communications?

A. Well, when I go to town I would always go to the bank and he told me that they wanted their money, wanted to get straightened out.

Q. Did you seek to get extensions?

A. I tried to but they wouldn't extend it. They wanted their money. Other parties out there were in the same boat I was.

Q. The stockmen out there were none of them particularly prosperous, is that what you mean?

A. Yes, they were all about in the same fix I was.

(Testimony of Edgar Sadler.)

The Court: It might be well for us to take our adjournment now and the record will show that we adjourn at this time in respect to the memory of Mr. Stoddard. Court will be in recess until tomorrow morning at 10:00 o'clock.

(Court adjourned at 2:45 p.m.) [461]

Tuesday, October 22, 1946, 10:45 A.M.

Appearances same as at previous sessions.

EDGAR SADLER

resumed the witness stand on further

Direct Examination

By Mr. Cooke:

Q. Mr. Sadler, yesterday before the recess I was asking you in regard to how these various mortgages were renewed and under what circumstances and what demands and the nature of the demands that were made by the mortgagee banks and other institutions that carried them. I show you what purports to be a letter from the Federal Land Bank at Berkeley, dated May 3, 1945, signed W. H. Bridges, Nevada Loan Division, and also letter dated May 31, 1933, Federal Land Bank of Berkeley, signed M. L. Jones, Treasury Department, and also letter from the Reno Branch of the Regional Agricultural Credit Corporation, Salt Lake City, Utah, dated June 2, 1933, signed C. A. Hefferman, Assistant, and also letter on the letterhead of the Farmers & Merchants National Bank

(Testimony of Edgar Sadler.)

of Eureka, dated October 9, 1935, signed C. L. Tobin, Cashier, and ask you to look those over and state whether or not those are some of the letters of demand that you received from these various mortgagee concerns in response to which you gave the mortgages and renewal mortgages, etc., that you have already testified to? A. Yes, sir.

Q. Did you receive other letters similar, or are these the only ones?

A. No, there are other letters, I think. [462]

Q. Of the same general purport? A. Yes.

Mr. Cooke: We offer these in evidence as samples of the demands that were made upon Mr. Sadler during the time covered by the letters.

Mr. Thompson: No objection, your Honor.

The Court: The exhibit may be admitted as Defendant's Exhibit "J-1."

Mr. Cooke: The gist of these, your Honor, is apparent from the question. Each of them is demand for payment of the loans, expressing the hope that they would be able to send the balance of the money due, and so on, stating the conditions of the renewal if it can be had. I think it is a fair statement that all of them represent the attitude on the part of the writers, being the mortgagee concerns, to get their money, or if they can't get their money, that there be a new mortgage given. It is the general type of letters that are received under those circumstances. One is that they couldn't carry the loan any longer under the banking laws and asks that he arrange with some other loaning concern

(Testimony of Edgar Sadler.)

to get the money if he can, and so on. I think that is about the gist of it, your Honor.

Q. Referring to Defendant's Exhibit "X," which is a deed of trust signed by yourself and your wife and Alfred Sadler and Kathryn Sadler and Walter C. Dean and Frnk R. Hodgson and H. W. Browning as trustees and the Land Commissioner as beneficiary, [463] and that was made on the 15th of April, 1937, for the principal sum of \$4200, do you remember about that particular instrument and transaction, Mr. Sadler? A. Yes, sir.

Q. What were the circumstances under which you negotiated that particular mortgage? Were you already indebted or why was it necessary for you to refinance, or just what was it?

A. Well, we owed the Farmers & Merchants Bank \$4200. The bank wanted their money and I proceeded to get this loan from the Federal Land Bank, giving the cattle as security on the second mortgage. It took quite a while to get this loan. We paid the bank up in full.

Q. This document reads, "Subject to an existing Federal Land Bank encumbrance."

A. Yes sir.

Q. You had already a loan? A. Yes, sir.

Q. This was really a second mortgage?

A. Second mortgage.

Q. And you got the \$4200 and satisfied the Farmers & Merchants Bank loan?

A. Yes, sir.

(Testimony of Edgar Sadler.)

Q. Now this document I just asked you about is deed of trust I have already described and that is dated April 15, 1937. Yesterday I showed you Exhibit "W" and I understood you to say that Exhibit "W" was given in connection with this same 42 or 43 hundred that you owed the Farmers & Merchants Bank. Do you remember that, Mr. Sadler? Did you give two instruments covering any such obligation to the Farmers & Merchants National Bank? A. No, sir.

Q. I was asking you about Defendant's Exhibit "W," which is a deed of trust from Edgar Sadler and others to these same parties, W. C. Dean, Frank R. Hodgson, H. W. Browning for the Land Commissioner, that is dated September 28, 1936, and that is for the sum of \$4300, subject to existing Federal Land Bank encumbrance. You recall that instrument, Exhibit "W," do you, that I showed you yesterday? What I am trying to do is to find out which one of these instruments, or if both of them, was given to refinance that \$4300 loan to the Farmers & Merchants Bank at Eureka?

A. I guess it was for both of them.

Q. That loan was for 42 or 43 hundred dollars, wasn't it? A. Yes.

Q. I don't quite understand what you mean by both of them to refinance. If you paid off one, it would settle that?

A. Oh, you mean to the bank?

Q. Yes. A. We only paid that balance.

Q. Then I was wondering just how you explain

(Testimony of Edgar Sadler.)

these two documents, one dated September 28, 1936, and the other, which apparently refers to this sum \$4300 was the same amount, dated the 15th of [465] April, 1937. That is Exhibit "X." I want you to explain, if you will, how you could make two of them subject to an existing Land Bank encumbrance and for the same amounts, to raise the money to pay the Farmers & Merchants balance of \$4300?

A. Well, there was only one paid, \$4200, but that might have been a copy or sent twice and been sent back again. It took a long time to get that loan. Sent papers to them and back again.

Q. This appears to have been recorded November 12, 1936. I am now referring to Exhibit "W." That is the best explanation you can give?

A. Yes. There was only one Commissioner loan of \$4200 given by us.

Q. This Exhibit "W" refers to \$4300.

A. Whatever it was, 42 or 43.

Q. The same item?

A. The same item, yes.

Q. And the Exhibit "X" refers to \$4200. Does that refresh your recollection in any way as to their being two instruments or explaining how that happened? A. No, I don't think there was.

Q. Do you remember anything in connection with Exhibit "X," which is the one dated April 15, 1937, and given by you and your wife and Alfred Sadler and Kathryn Sadler, these three men, Walter C. Dean, Frank R. Hodgson and H. W. Browning as trustees, do you remember anything about

(Testimony of Edgar Sadler.)

how that came to be given or the negotiations [466] necessary in order to get it? If you had any difficulty about it or anything of that sort?

A. Had plenty of difficulty to get it.

Q. That is this \$4200 loan to pay off the Farmers & Merchants National Bank? A. Yes.

Q. When you say you had plenty of difficulty, you refer to hard to raise money or what?

A. Yes, hard to raise money.

Q. And this second mortgage, there was already an existing Federal Land Bank loan on the property? A. Yes, sir.

Q. Do you remember what the amount of that was at the time this was given?

A. Close to \$12,000.

Q. Existing April, 1937? A. Yes, sir.

Q. The indebtedness fluctuated, didn't it?

A. Yes, sir.

Q. What was the highest amount of indebtedness that you can recall the ranch was under at any one time? A. About 38 thousand dollars.

Q. Do you remember about what year that was?

A. '38, somewhere along there.

Q. The year 1938 is that what you mean? [467]

A. Yes, sir.

Q. And it was about 38 thousand dollars?

A. Yes.

Q. Was that all secured by mortgage or notes or other obligations? A. Mortgages.

Q. Did you owe other unsecured items, that is promissory notes or accounts on top of that?

A. No, I don't think so.

(Testimony of Edgar Sadler.)

Q. What was the least and the lowest amount that the ranch was mortgaged for outstanding, that the ranch and property was mortgaged for? What year was it, if you can give it, Mr. Sadler, that you had it reduced down the lowest? It never was clear, was it?

A. No, sir.

Q. Since 1918?

A. No, sir.

Q. Tell us, if you can, what the lowest figure was, indebtedness, secured or otherwise, during what year?

A. You mean at the present time?

Q. No, the lowest figure any time since March, 1918.

A. About ten thousand and something.

Q. At the present time what is it?

A. That is what I mean, at the present time.

Q. Has it been any lower at any time since 1918?

A. No, sir.

Q. Always that much or more?

A. More, yes, sir.

Q. Now with reference to Defendant's Exhibit "Y," that is a livestock chattel mortgage by Edgar Sadler, Ethel Sadler and Reinhold Sadler and Verna Sadler, dated April 15, 1937. Did you have anything to do with negotiating of that loan?

A. Yes, sir.

Q. Who, as a general thing, did take care of the negotiations, conferences and meetings with the banks or these various mortgagees on behalf of the Sadler family?

A. Reinhold Sadler and myself and my wife.

(Testimony of Edgar Sadler.)

Q. Well, who took the lead in it, if anybody?

A. I did.

Q. Now with reference to this particular chattel mortgage of April 15, 1937, which is Defendant's Exhibit "Y," that refers to indebtedness of \$13,544. Do you recall anything special in the way of difficulty or time consumed or anything in regard to your efforts to get that money?

Mr. Thompson: Objected to as immaterial, your Honor.

Mr. Cooke: The materiality, as we see it, your Honor, lies in his proof or tendency to prove the allegations of the defendant's special defense of laches and the methods and the difficulties met with in raising money to carry on during this time when we intend to claim that, if any of the parties were claiming an interest in the property they should have come forward and offered help; that Mr. Sadler was lulled into a sense of security by there being no claim made until this suit was brought, no effective claim made, until the suit was brought and therefore the parties who are now asserting the claim are estopped by their own neglect and laches. If the ranch were going ahead swimmingly and Mr. Sadler having an easy time of it and it was on the receiving end all the time, that would be one situation. The proposition of laches there would be of very little importance, whereas if he was experiencing all kinds of difficulties in getting the money and was continually harrassed by these demands and refinances, etc., I think that that would be

(Testimony of Edgar Sadler.)

material as tending to prove what we claim is laches and estoppel of the plaintiff in respect——

The Court: He may answer the question. Objection will be overruled.

(Question read.)

A. Well, I had quite a time to get it.

Q. Do you remember what you did, if you had to take any trips?

A. Let me see that. Is that the original? Yes, sir, I had to take a good many trips to Elko.

Q. Were those trips in reference to the negotiations that led up to the making of this loan?

A. Yes, sir.

Q. Did anybody else participate in those negotiations on behalf [470] of the Sadler family or any of the Sadlers?

A. Which Sadler family? There are three or four Sadler families.

Q. Well, the Sadler family living on the ranch?

Mr. Thompson: Objected to as immaterial, your Honor.

(Question read.)

The Court: Objection overruled. You may answer the question.

A. Well, my son and my wife and his wife. We all talked it over.

Q. But you took these trips alone, did you?

A. Well, one of the boys went with me most of the time or my wife.

(Testimony of Edgar Sadler.)

Q. Without going into each one of the remaining exhibits—you have had them shown to you and you have examined them—is it about the same story as to each of them in regard to the difficulty of raising the money and of your efforts to get the loans and the accommodations from the mortgagee banks and corporations? About the same thing?

A. Yes, about the same thing.

Q. Did you have any help from anybody on any of them? A. No, sir.

Q. And the answer you have given will apply to Defendant's Exhibits "Z," "A-1," "B-1," "C-1," "D-1," "E-1," "F-1," "G-1," "H-1" and "I-1," because they are all mortgages of one time or another. Mr. Furrh has called my attention to the fact that "F-1" was date of 1885, which I will ask to be excluded from that general question. [471] Now all the other documents I asked you about, and I believe the mortgages you have seen, the same answer in general would apply to all those documents as to your difficulties in getting the money, your efforts, etc? A. Yes, sir.

Q. Who is holding the mortgage on the property now? A. The Federal Land Bank.

Q. And do you know who they are represented by, agents or the like?

A. Well, we pay our interest here in Reno. I don't know his name. My son knows his name.

Q. How long, if you know, since that mortgage was put on the property?

A. 1928, I think, somewhere along in there.

(Testimony of Edgar Sadler.)

Q. It as been continued ever since?

A. Yes, sir.

Q. That is for a long period of time?

A. Thirty-six years.

Q. And that is included in one of the mortgages that I called your attention to? A. Yes, sir.

Q. Now since March, 1918, have you had any unusual hard winters where you lost any considerable number of cattle, as compared to other years?

A. Two or three of them. [472]

Q. What would be the average loss, taking that entire period of time from March 1918 down to date, what would be the average loss?

A. About ten per cent?

Q. How would you lose that ten per cent?

A. Well, they died.

Q. Died from what? A. Cold.

Q. What? A. Freeze.

Q. General things that cause cattle to die?

A. Yes, sir.

Q. Is your ranch so equipped that it can give the ordinary care to the cattle? A. Yes, sir.

Q. Do you expect your losses wouldn't be less than the average in that community?

A. No, sir; but in those hard winters it was a tough proposition.

Q. Now when was the first hard winter after March, 1918? A. '31 and '32.

Q. And what was the loss in cattle on the Sadler ranch for that year, if you can say?

A. Two hundred head or over.

(Testimony of Edgar Sadler.)

Q. Out of how many?

A. Six hundred or seven hundred.

Q. You lost somewhere near one-third the entire bunch? [473]

A. Yes, sir.

Q. How did that compare with loss of cattle around there on other ranches?

A. They all lost.

Q. That was an exceptionally hard winter, wasn't it?

A. Yes, sir.

Q. Now calling your attention to 1936, do you remember about that year or winter, with reference to its being unusually cold?

A. Yes, sir, lost about one hundred odd of cattle that year.

Q. You had a CCC camp out there in that neighborhood at that time?

A. Yes, sir.

Q. Do you remember the incident of some of the boys at that camp freezing to death that winter?

A. Yes, sir.

Q. And was there any winter, either in 1932 or 1936 or any other year, where it was so cold the railroad couldn't run from Palisade to Eureka?

A. Well, the railroad didn't run in 1931 and 1932.

Q. What about 1936?

A. It had to stop. We had some cottonseed cake ordered and we never hardly got it until after we didn't need it so much.

Q. On account of lack of transportation?

A. Yes, couldn't get it in.

Q. In 1925 how about that for a winter? Was that hard or average [474] or what?

(Testimony of Edgar Sadler.)

A. Oh, that wasn't so bad.

Q. That wasn't so bad as these other two?

A. No, sir.

Q. 1932 was the worst?

A. Yes, sir, the worst.

Q. How about 1925, do you recall anything as to the loss of cattle or what the winter was, as to being severe or otherwise?

A. It was a pretty bad winter but I don't know exactly how many cattle we did lose, but we lost cattle.

Q. Above the average?

A. Yes, above the average.

Q. You mentioned some other ranchers in your neighborhood there that lost their stock or went broke or the like. Can you give the names of any of them?

Mr. Thompson: Objected to as immaterial, your Honor.

The Court: Objection overruled. Answer the question.

A. You mean——

Q. Other ranchers that lost heavily of their cattle or even went into bankruptcy or broke?

A. Bill Rand was one and Pete Corletti, he was another, and across the other valley Mr. Moore, he was another one. In fact, most every one in that country lost cattle. They couldn't save them.

Q. But what I am getting at is whether their losses were such [475] that they were put out of business?

(Testimony of Edgar Sadler.)

A. Well, most of those parties were.

Q. When was that, in 1932 or 1936, if you can state?
A. '32, I think.

Q. What is the average snow depth out there?

A. Well, about 12 inches, 8 to 12 inches.

Q. How long does it last?

A. About three months.

Q. Commences about when?

A. Oh, at different times, December mostly.

Q. And continues through January, February, and into March?
A. Into March.

Q. Mr. Sadler, you told us about your experience in handling cattle, etc. Can you tell us about the average age of cows, when they are calves and so on, from year year, about what the average is.

A. You mean how old they are?

Q. Yes, how old they get before they simply die from old age?
A. Well, from 8 to 12 years.

Q. Now in 1918 when you and Alfred got the deed to this property by the payment of \$16,500, you borrowed \$15,000, is that right? You gave a mortgage back to the Washoe County Bank for \$15,000?
A. On the ranch.

Q. And that included what you call the ranch cattle too, did it not, the J bar C 20 head or so?

A. Supposed to.

Q. Now there were \$1500 that appears to have been obtained at that time for payroll, suit, and so on. Was that borrowed also?
A. Yes, sir.

Q. And mortgage to the bank covered both items?
A. Yes, sir.

(Testimony of Edgar Sadler.)

Q. A total of \$16,500? A. Yes, sir.

Q. What were you doing at the time just prior to March, 1918, and thereafter for some time? What were you doing, do you know?

A. I was on the ranch.

Q. Well, you told us about running a stage?

A. Oh, yes, I ran a stage from the ranch to Eureka.

Q. Carrying mail? A. Yes, sir.

Q. You had been running that prior to March, 1918, had you not? A. Yes, sir.

Q. And how long after March, 1918, did you continue to run the stage?

A. Oh, until '26, I think, somewhere along in there.

Q. About eight years. Did you succeed in realizing any money out of that? Make any money?

A. No, never made any money.

Q. Why did you keep on?

A. Well, in connection with the ranch, it was a great thing to [477] get our mail and I put in those bids and got the contract for it.

Q. Whatever monies you did get out of your stage contract business do you know how it was used? A. It was used on the ranch.

Q. Can you give us any idea how you would use it?

A. Oh, paying bills and different things.

Q. Keeping up the operations?

A. Keeping up the operations.

(Testimony of Edgar Sadler.)

Q. In March, 1918, can you give us any idea of the value of the ranch as compared with the value of the cattle that you put in the mortgage?

A. About the same thing.

Q. About a stand-off?

A. About a stand-off.

Q. Well, what would you say the value of the ranch was? You paid \$15,000 for the entire property?

A. That is it was worth about then.

Q. The entire ranch? A. Yes.

Q. And that would fairly represent the value, you say? A. Yes, sir.

Q. So that the cattle then that you put into that mortgage to get that \$16,500 represent substantially the same amount in value, is that right?

A. Yes, sir. [478]

The Court: I don't quite understand the answer and question. The ranch valued at \$15,000 and the cattle valued at \$15,000?

Mr. Cooke: Yes, that is as I understand it. Is that your answer? A. Yes.

Q. What, if you can state, was the value of cattle, a cow and a calf? A. About \$65.00.

Mr. Thompson: A cow and a calf together?

Mr. Cooke: Yes. Is that right? A. Yes.

Q. You had, you testified 200 of the quarter circle cattle that belonged to you exclusively?

A. Yes, sir.

(Testimony of Edgar Sadler.)

Q. And then you had what was called the ranch cattle?

The Court: Do you call that quarter circle or two half circles? A. Two half circles.

Q. Two half circles interlocking?

A. Yes; everybody has a different name for it.

Q. That was 200 head of yours?

A. Yes, sir.

Q. And then you included in there what is called the ranch cattle with the J bar C brand? [479]

A. Yes, sir.

Q. Something like 20 head? A. Yes, sir.

Q. Do you know anything about, from your rather extensive experience borrowing money, about how much these loaning companies would loan on the ranch, loan without any cattle?

A. Without any cattle?

Q. Yes.

A. They wouldn't loan very much.

Q. Well, that is not very definite. Now this ranch here, we will say, was worth \$15,000. Can you tell us anything about what you should have been able to have gotten on the ranch if you hadn't had any cattle whatever, how much loan you would be able to get?

A. Might have got ten thousand dollars.

Q. Two-thirds? A. Yes.

Q. A ranch without any cattle is rather more of a liability than it is an asset, isn't it?

A. Yes, sir.

(Testimony of Edgar Sadler.)

Q. Would it be feasible at all to attempt to operate a ranch out there without cattle or without sheep? A. I didn't get that.

Q. Would it be feasible to attempt to run a ranch such as you have there, six thousand odd acres, without any cattle or livestock? [480]

A. No, sir.

Q. You couldn't do it all?

A. You might do it, but without the cattle you couldn't do nothing.

Q. I mean from an economical standpoint you couldn't do it? A. No, you couldn't do it.

Q. Mr. Sadler, if during the period intermediate between March, 1918, and down, we will say, to 1940, or thereabouts, if you had supposed that there was going to be any claim of trust on this entire property, being under some sort of a trust for the benefit of the other heirs, with you only representing approximately a quarter, would you have gone ahead with the work at all?

A. No, sir, I would have quit.

Q. Your son Floyd acquired the interest that we have already heard about in 1930, is that right?

A. Yes, sir.

Q. That is my mistake, 1937. Floyd came in in 1937 and Reinhold came in in 1930?

A. Yes, sir.

Q. Do you remember what the indebtedness was on the ranch in 1937 when Floyd came in?

A. About 38 thousand dollars.

(Testimony of Edgar Sadler.)

Q. What was it when Reinhold came in, if you recall? A. Twenty-two thousand dollars.

Q. Is all of that represented by mortgages or would it probably [481] include other items, notes, etc.? A. Mortgages.

Q. Now you have told us that that indebtedness has been reduced from that high point or points down to about 11 or 12 thousand, I think you said now? A. Yes, sir.

Q. Where did the money come from to reduce that? A. Out of the cattle.

Q. Out of what cattle?

A. My boys' and myself.

Q. And your wife's? A. My wife's.

Q. From all of these cattle, these half circle cattle and the brand T E?

A. Yes, and the other.

Q. And that is divided, I think you have told us one-third each? A. Yes, sir.

Q. That is the practice? A. Yes, sir.

Mr. Cooke: I think that is all.

Cross-Examination

By Mr. Thompson:

Q. Mr. Sadler, you have had all the profits from the ranch, when there were profits, since 1918, have you not?

A. There never were any profits. [482]

Q. You and your family have lived on the ranch? A. Yes, sir.

Q. You have not starved to death?

A. No, we haven't starved to death.

(Testimony of Edgar Sadler.)

Q. And what income there was during that period of time you and your family have had, have they not? A. Yes, sir.

Q. And nobody else has shared in that profit?

A. No, sir.

Q. Do you recall in 1918 this chattel mortgage, Defendant's Exhibit "A" was executed by you and your brother Alfred Sadler? A. Yes, sir.

Q. Do you recall that chattel mortgage? You see that chattel mortgage covered 50 head of cattle branded J bar C and 200 head of cattle branded two half circles? A. That's right.

Q. Now this Exhibit "A" was prepared by the law firm of Cheney, Downer, Price & Haskins in Reno, Nevada, was it not? A. Yes, sir.

Q. I show you Plaintiff's Exhibit 42 for identification, is that in your handwriting?

A. Yes, sir.

Q. And is that not a memorandum that you sent to Alfred Sadler prior to the time this mortgage, Defendant's Exhibit "A," was executed, so that he and the attorneys would know what cattle [483] were on the ranch?

A. No, sir, I was in Reno at that time.

Q. Did you prepare this when you were in Reno at that time? A. I think I did.

Mr. Thompson: I offer Exhibit 42 in evidence, your Honor.

Mr. Cooke: No objection.

The Court: It may be admitted as Plaintiff's Exhibit 42.

(Testimony of Edgar Sadler.)

Mr. Thompson: The exhibit states "Branded 50 head J bar C right hip, right ear split; 200 head half circle right hip, right ear split."

Q. You testified yesterday, I believe, Mr. Sadler, that Exhibit "R," a mortgage for ten thousand dollars to the First National Bank of Winnemucca and the Farmers & Merchants National Bank of Eureka, was given to secure a loan and that the money so secured was used to pay off the mortgage to the Washoe County Bank, that is the chattel mortgage and the real property mortgage to the Washoe County Bank? A. Yes, sir.

Q. Now isn't it true that Defendant's Exhibit "E-1," which is the deed of trust to the Federal Farm Loan Bank in the principal sum of \$13,000, that the money secured by this loan, Exhibit "E-1," was used to pay off the loan secured by Exhibit "R?" A. Yes, sir.

Q. And Exhibit E-1 is the mortgage that is now on the ranch, the encumbrance that is now on the ranch? [484] A. Yes, sir.

Q. The balance due on it is ten thousand dollars?

A. A little over ten thousand dollars.

Q. There aren't any other existing mortgages or encumbrances on the ranch or the cattle on the ranch, is that true? A. No, sir.

Q. That is the only outstanding on it at the present time? A. Yes, sir.

Q. You testified, Mr. Sadler, that on January 10, 1938, you secured a loan which was secured by a chattel mortgage from the Regional Agricultural

(Testimony of Edgar Sadler.)

Credit Corporation for \$12,374.25, that is evidenced by Exhibit "G-1," and on January 7, 1938, you secured a loan for \$18,280, which is evidenced by Defendant's Exhibit "H-1." Were both of those loans outstanding at the same time?

Mr. Cooke: Would it help you to see the mortgages?

A. I don't think so. When I had that first mortgage there, the way the Regional done, we had that mortgage, then we made application for a renewal and get enough money in our budget to run for the year. You have to sign a mortgage for the whole amount.

Q. I show you Exhibit "G-1" and "H-1." Now were both of those loans on the cattle at the same time? A. No.

Q. They are only three days apart.

A. Well, one is a renewal.

The Court: What exhibits are those, Mr. Thompson? [485]

Mr. Thompson: "G-1" and "H-1."

Q. Which one is a renewal?

A. The one for \$18,000.

Q. What does it renew?

A. Renews this one.

Q. Three days after it was given?

A. Well, I don't know—

Q. Are you sure that both of those chattel mortgages were executed, or just one of them was executed?

(Testimony of Edgar Sadler.)

A. It was the one here that we were getting the money for.

Q. Exhibit "H-1?"

A. I don't know what exhibit it is.

Q. "H-1." You got \$18,000 when you gave that chattel mortgage, is that right? A. Yes.

Q. \$18,280 on January 7, 1938. Now, looking at Exhibit "G-1," did you get \$12,374.25?

A. In addition to that?

Q. Yes.

A. No. I wouldn't need that much money.

Q. Well, some of the mortgages that——

A. That was the year before. That date is wrong. Then this one come in afterwards. Every year we had to make a new mortgage.

Q. Well, you say in 1938 you owed 38 thousand dollars. What did those debts consist of? First you had the Federal Farm Loan Bank [486] on Exhibit "E-1." How much did you owe on that in 1938?

A. I couldn't tell you the exact amount.

Q. I mean approximately?

A. Twelve thousand dollars.

Q. What other debts did you owe in 1938?

A. On cattle?

Q. How much, about 26 thousand dollars?

A. Yes.

Q. Defendant's Exhibit "A-1," Mr. Sadler, is that a renewal chattel mortgage or did you obtain some cash money when you signed that?

A. That was a renewal.

Q. That was a renewal?

(Testimony of Edgar Sadler.)

A. Yes. Well, we got our money for our budget and that was added in. We run on a budget them days.

Q. Which government agency supervised the budget?

A. The Regional Agricultural Company?

Q. And was the Federal Land Bank of Berkeley involved in that in any way in your budget?

A. Yes, they were supposed to get their interest.

Q. Isn't it true that in managing the ranch since 1918 you sold some cattle each year and would buy additional cattle with the proceeds of the cattle sold?

A. No, sir.

Q. It isn't? [487] A. No, sir.

Q. How did you operate? When you ran the ranch, how did you run it? Where did you get money to buy new cattle? A. Borrowed it.

Q. You always borrowed it?

A. Beside what my in-laws put in and my wife.

Q. Didn't you ever use the money that you got from the sale of cattle to refresh your new stock?

A. No, sir.

Q. You used it to pay off the loans on the old cattle? A. Yes, sir.

Q. And then you just borrowed more money on some cattle, is that right? A. Yes, sir.

Q. Is that the way you operated?

A. Yes, sir.

Q. In 1927 when you executed a chattel mortgage, was that not to buy additional cattle. That was March 28, 1929. I show you Exhibit "S," which is a chattel mortgage for \$2700, dated March 28,

(Testimony of Edgar Sadler.)

1929, and the property described consisted of 380 head of cattle branded two half circles. Was this chattel mortgage given to buy some new cattle?

A. I don't think so. I used the money on the ranch.

Q. And the cattle covered by Exhibit "S" were already on the ranch at that time?

A. Yes. [488]

Q. Mr. Sadler, did you ever buy some bulls from the Dangberg Land & Livestock Company in Douglas County?

A. Yes, sir.

Q. When was that?

A. I can't remember the dates. I bought bulls, that is all I know, and paid for them.

Q. How many?

A. Three or four.

Q. Do you remember how much you paid for them?

A. No, I don't know exactly what I paid for them. The boys can tell you that better than I can.

Q. I show you Defendant's Exhibit "J," which is a letter written to you dated May 6, 1944, and signed "Clarence." Did you receive that letter?

A. I received about the same thing.

Q. Did you answer the letter?

A. No, sir.

Q. You testified, I believe, that Alfred Sadler, your brother, was on the Diamond Ranch about four times after 1918?

A. Somewhere along there.

Q. And the last time Alfred Sadler was on the ranch was in November, 1943, was it not?

A. Yes, sir.

Q. He was there with his son, Edward Sadler?

A. Yes, sir. [489]

(Testimony of Edgar Sadler.)

Q. Prior to 1918 how much of the time was your brother, Alfred Sadler, on the ranch?

A. He wasn't there very much.

Q. Did he ever live on the ranch?

A. No, sir.

Q. He lived most of his life in Reno, Nevada, is that right? A. Yes, sir.

Q. And that is also true prior to 1918?

A. Yes, sir.

Q. And prior to 1918 did Alfred Sadler work on the Diamond Ranch?

A. No, sir; he was there for a little while haying about two or three weeks.

Q. Do you remember which year that was?

A. The time that—the year that Tonopah was in its boom he was working there and they sent for him to come to Tonopah and he went to Tonopah from the ranch. He worked a while haying there. After he got through school here. He graduated and then he come to the ranch and stayed there and then they sent some parties—I don't know who it was—sent for him to come to Tonopah and he went to Tonopah.

Q. Do you remember the year that Alfred Sadler got through school? A. No, I don't.

Q. Do you think it was about 1901?

A. Somewhere along there. I don't know, I didn't keep track of those dates at all. [490]

Q. Well, between the time he got out of school and 1918 was he only on the ranch that one summer?

A. That's all. He wasn't there all summer. He was just there for a short time.

(Testimony of Edgar Sadler.)

Q. Do you recall your mother's death, Louisa Sadler's death, in 1923? A. Yes, sir.

Q. Do you know where she was living prior to her death?

A. Well, I think she was down at Grass Valley and then they brought her to Carson.

Q. Did she have any relatives in Grass Valley?

A. Yes, sir.

Q. Was that Louis Zader? A. Yes, sir.

Q. Her son-in-law, is that correct?

A. Yes, sir.

Q. And your mother went to Grass Valley to stay with her sister-in-law because she was feeble toward the end, is that right? A. I suppose so.

Q. And then she was brought back to Carson City to be buried? A. Yes, sir.

Q. When did you first see the brand for horses, an "S" with a half circle over the "S?" When did you first see that brand?

A. I got it made myself.

Q. You got that made yourself? [491]

A. Yes, sir.

Q. When did you have it made?

A. I couldn't say what year.

Q. Well, about when, if you recall?

A. About in 1928, somewhere along in there.

Q. About 1918?

A. Somewhere along in there.

Q. Were there any horses on the Diamond Valley Ranch on March 2, 1918? A. Some.

Q. How many? A. Oh, maybe 15 head.

(Testimony of Edgar Sadler.)

Q. How were those branded?

A. All kinds of brands. Bought a part and traded for them.

Q. At that time you didn't have a horse brand, is that right?

A. No, the horse brand was sold. When the ranch holdings were sold, the horse brand was sold, the old brand of the Huntington & Diamond Valley Land & Stock Company. The brand was quarter circle "V" on the right shoulder.

Q. That was the brand of the Huntington & Diamond Valley Land & Stock Company, is that correct?

A. Yes, sir.

Mr. Cooke: Is that a horse brand or a cattle brand?

A. Horse brand. That was sold before my father died, long before.

Mr. Thompson: That's all. [492]

The Court: We will take our noon recess at this time. We will be in recess until two o'clock this afternoon.

Afternoon Session, October 22, 1946

2:15 P.M.

Appearances same as at previous sessions.

MR. EDGAR SADLER

resumed the witness stand on

Re-direct Examination

By Mr. Cooke:

Q. I call your attention to document designated

(Testimony of Mr. Edgar Sadler.)

as Defendant's Exhibit "J," dated May 6, 1944, letter to you from Clarence. You remember seeing that letter when counsel showed it to you on cross-examination? A. Yes.

Q. And I think you stated in answer to his question whether you ever replied to that letter that you had not? A. Yes.

Q. Why didn't you?

A. Well, because I think I didn't have any reason to reply to it at all. He had started the suit, I think, and I turned the letter over to you, I think.

Q. Mr. Thompson asked you a number of questions about cattle out on the ranch and called your attention to Exhibit 42. Do you remember that exhibit? I think it was a short note in pencil [493] that stated something about 50 head of J bar C and 200 head of quarter circle? A. Yes.

Q. It is here marked Plaintiff's Exhibit No. 42. When was that made—it not being dated—when was that made, if you recall, about? With reference to the time of the mortgage given to the Washoe County Bank of \$16,500? A. At that time.

Q. And do you remember to whom you delivered this? A. I don't remember.

Q. Do you remember anything about the paper at all?

A. No, I don't remember it at all.

Q. It is your handwriting?

A. Yes, sir, that is mine.

Q. I think you testified in regard to the chattel mortgage of 50 head of J bar C cattle that were in-

(Testimony of Mr. Edgar Sadler.)

cluded with the 200 quarter circle cattle. That 50 head was put in there as a sort of outside maximum figure? A. Yes, sir.

Q. And on checking up you found only about 20?

A. Yes, 20 cattle.

Q. And those were the 20 head I think you testified that Herman Sadler told you you could have?

A. Yes, sir.

Q. You didn't have any dispute about them so you took them over [494] and that ended it?

A. That was the end of it.

Q. Did you have any exact data or have occasion to ascertain the exact number of J bar C cattle prior to March 2, 1918? A. No.

Q. Some question was asked you about the budget, etc. These mortgages, if I am not mistaken, provide for principal sum and then provide for the mortgagee's advancing further sums for the care of the stock, etc., if necessary? A. Yes, sir.

Q. Under that would it be possible, for instance, for the mortgages to show on their face that there was a ten thousand dollar indebtedness but that there might be some notes given for subsequent advances? A. I don't think so.

Q. Well, wouldn't you give notes for subsequent advances made? A. Yes, sir.

Q. There would be a mortgage for a given sum, say ten thousand, and under this budget system if you required further monies from year to year, wouldn't you give notes from time to time, additional notes for that? A. Yes, sir.

(Testimony of Mr. Edgar Sadler.)

Q. So the mortgage doesn't represent exactly the amount of the entire indebtedness for any particular time? A. No. [495]

Q. The outstanding notes, but those notes would be secured by the mortgages?

A. Yes, by notes.

Q. Now counsel showed you Exhibit "G-1" and Exhibit "H-1," one dated January 7, 1938, and the other dated January 10, 1938, a few days later. I will show this to you. I think you stated that you did not know just how it came about. I call your attention to Exhibit "H-1," is made by yourself and your wife and Reinhold and his wife to the Bank of America Agricultural Credit Corporation. Notice that office up there? A. Yes.

Q. The other instrument that was dated January 10, 1938, three days later, appears to be made to the Regional Agricultural Credit Corporation, Salt Lake City. Those are not the same concerns, are they? A. Which?

Q. Well, those two concerns, the mortgagor? This one here is the Bank of America, San Francisco? A. Yes.

Q. And this one here is the Regional Agricultural Credit Corporation, Salt Lake City?

A. Yes.

Q. Counsel asked you some questions about Exhibit "A-1" and I think you testified that was a renewal. You were then on a budget, borrowed money to buy new cattle and you said something about

(Testimony of Mr. Edgar Sadler.)

[496] money that you received from the boys and your wife. Do you remember how much money Reinhold put in to start?

A. I know he put all he had in, 1600 and some odd dollars.

Q. Do you remember the amount that his wife put in from her school teaching, into the ranch or improvements and the like?

A. You mean for the house that they built?

Q. Yes.

A. She put in two thousand dollars.

Q. In your answer in this case you were referring, and I think you also testified, to something about life insurance policies which you cashed and which were used in the ranch. Do you remember about that? A. Yes, sir.

Q. You stated that you had three life insurance policies, one issued by the New York Life Insurance Company, three thousand dollars, cashed by you in 1920, and one issued by the Kansas City Life Insurance Company for \$1800 or over and that was cashed by you in 1922. That Kansas City Life Insurance Company policy, was that for the \$1800 note?

Mr. Thompson: Objected to as leading and on the further ground not re-direct examination, the further ground it has already been asked and answered.

The Court: Objection will be overruled.

Q. I was trying to find out what the facts of that policy was, if you remember? [497]

A. It was a policy for three thousand dollars and I got 1800 out of it.

(Testimony of Mr. Edgar Sadler.)

Q. You cashed it in for that money?

A. That's right.

Q. And how about the two policies with the New York Life Insurance Company for the three thousand mentioned in this same paragraph? Did you get the full amount of that?

A. No, I never got the full amount of any of them. I cashed them in for so much.

Q. Do you remember how much you got on the New York Life Insurance Company?

A. I can't say. I think one I got \$2600.

Q. How long had you been carrying the New York Life Insurance policy, when did you take it out?

A. When I was about 25 years old.

Q. What year would that be? How long prior, we will say, to the time you cashed them in in 1920 and 1922?

A. There was one cashed in before 1922 and the other one was afterward.

Q. That is not what I am asking you, Mr. Sadler. I am trying to find out when you first took that insurance out. You said when you were 25, but some of us may not know when that would be. How long had you carried them before you cashed them in? What year were you born?

A. '76. [498]

Q. That would make it along about 1905, about the time your father died?

A. Yes.

Q. When you took this insurance out?

A. Before he died, I think.

(Testimony of Mr. Edgar Sadler.)

Q. And you carried it from that time on down until this time that you cashed them in?

A. Yes.

Q. The dwelling house that was built there in 1922 after the other one burned down, do you know from what source the money came to build that?

A. The money from the insurance policies to reconstruct the building. Part of it.

Q. And the balance of the money from these insurance policies was used for what purpose, do you know?

A. For expenses of the ranch.

Q. To keep things up and keep them going?

A. Yes, to keep it going.

Q. You testified that Alfred had been on the ranch some three or four times for this period from March 2, 1918 down to the time he died, and I think you said the last time was in November of some year, but I didn't get that year. Do you remember what year that was?

A. The year before he died.

Q. That would be '43, wouldn't it? [499]

A. Yes.

Q. You said something about he left the ranch at the time of the Tonopah boom. Tonopah, as a matter of fact had two booms?

A. Well, when it was first discovered.

Q. That was about 1900 or 1901?

A. Somewhere along in there.

Q. And that is when he left the ranch and went to Tonopah with this friend or party who wanted him to go down there?

(Testimony of Mr. Edgar Sadler.)

A. Yes, he went down there. I think he went down with George Bartlett. Took a team of mules from the ranch and wanted to do some work surveying or something.

Q. George Bartlett at that time was living in Eureka, wasn't he?

A. Yes, he was living in Eureka.

Q. You appear to have given in your testimony a good many details that took place in these mortgages, etc. Did you ever keep any books of accounts, set of books on the business?

A. No.

Mr. Cooke: That's all.

Mr. Thompson: That's all.

MRS. ETHEL SADLER

was recalled and having been previously sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. Do you remember of the construction of the house that Reinhold and his wife are living [500] in?

A. Yes sir, I do.

Q. Do you remember about when that was?

A. Well, it was at the time we were trying to get that Commissioner's loan. I was living here in Reno at the time and I know we went out there and we saw the lumber on the ground and I was surely worried; I was afraid he would have to leave

(Testimony of Mrs. Ethel Sadler.)

and all this lumber to build a house, with things so much unsettled.

Q. You had quite a hard time trying to get a loan on the ranch?

A. Yes we did, we had a real hard time.

Q. Do you know or have you learned where the money came from to finally pay for that house?

A. Reinhold's house?

Q. Yes.

A. Well, she taught school and Reinhold drove the stage.

Q. Well, what is your answer then as to where the cost of building that house came from? Who paid for it?

A. Reinhold and his wife.

Q. It wasn't necessary to take it out of the loan?

A. No.

Q. Do you know about how much it cost?

A. They figured two thousand dollars to build that house.

Q. You were called in from time to time to sign mortgages that have been exhibited in evidence here, you recall that, do you.

A. Yes.

Q. And what have you to say as to the difficulty getting loans [501] and getting renewals and getting by financially on the ranch during this period from March, 1918 down to the time of the commencement of this suit?

A. Well, it wasn't very easy. In 1930 we bought those cattle and in 1931 and '32 was that hard winter and the trains didn't run at that time for two months, and well, one time we had to feed the cattle, start in feeding the cattle early.

(Testimony of Mrs. Ethel Sadler.)

Q. Are you talking about 1931-'32?

A. Yes.

Q. That was the hardest winter, was it?

A. Yes, that was. The summer was dry. It was a dry summer and the cattle had to go so far to those water holes, I remember I was throwing hay around the fence and one fell down at the time. They came in in poor condition, and then it was 1930 and 1935, below zero and the thermometer didn't even register, it was so cold. And these snowfalls lasted sometimes for eight days at a time and I can remember going out and seeing—I counted, I know, one morning, seven dead head and you would think they were lying there sleeping and they were just lying there with their heads down, frozen to death.

Q. Do you know anything about the percentage of cattle that were lost that winter?

A. Yes, I do. In the fall we counted them. There were 200 less and then we had to sell the steers that 1932. In the fall of 1932 we sold 57 head of steers for \$1812. That was the beginning of [502] this depression and that \$1812 was just a whole year's work, that was a whole year's work for \$1812, because we only sold cattle once a year and we figured at that time that wouldn't take care of hardly the interest and the taxes and everything else and that is why we had to borrow so much.

Q. Do you know approximately what the yearly taxes for the year was on the ranch?

A. No, it fluctuates.

Q. Now you told us about the sale of a number

(Testimony of Mrs. Ethel Sadler.)

of steers and the total value or total amount realized was 1800 some odd dollars. Do you remember how much you got per pound per head?

A. I know it was four cents per pound. That was all we were getting. And this depression lasted——

Q. They ran in the neighborhood of \$30 per head?

A. Just about.

Q. Were there any other hard winters at all comparable to 1931 and 1932?

A. Well, I was here in Reno the one that was there in 1936, but I can remember that too. The CC camp was there, and you maybe heard that over the radio where these boys were snowed in and there was no chance to get food to them and there were a couple of boys froze to death.

Q. What about the loss of stock that year?

A. They figured they lost about 125 that year and I imagine that [503] was during the depression too, because it lasted quite a while.

Q. The loss of the 125 head you would say was due to the hard winter?

A. Oh yes.

Q. Your husband, I think, testified 10 per cent was the amount of the loss. Do you know anything about that?

A. Well, that is what the stockmen figured, 10% loss.

Q. Was there any other winter where the stock suffered and died in excessive numbers?

A. Well, those were the two years.

Q. The two hard winters?

(Testimony of Mrs. Ethel Sadler.)

A. Yes, they were the two really hard winters.

Mr. Cooke: That's all.

Mr. Thompson: No cross-examination.

REINHOLD SADLER

was recalled and having been previously sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. I think it is alleged and testified to somewhere in this case that your interest in the ranch, financial interest in the ranch, you became sort of a partner there, in 1930, is that correct?

A. Yes.

Q. Can you tell us about what the total outstanding indebtedness of the ranch was at that [504] time?

A. Around 22 thousand dollars.

Q. Do you know anything about what the total outstanding indebtedness was in 1937 when your brother Floyd came home as a partner?

A. I believe around 38 thousand.

Q. Would the indebtedness that you mention be all represented by the face of the mortgages?

A. No.

Q. Well, for instance, you take on a given year and given time and the mortgage at that time outstanding on its face was ten thousand dollars. How would there be any additional secured indebtedness?

(Testimony of Reinhold Sadler.)

A. Well, we were running on a budget at that time and you ask for your money ahead and then as you withdrew this money you signed a note.

Q. You signed up for a matter of ten thousand dollars and then would the aggregate of those notes be in excess of the face of the mortgage sometimes?

A. Yes.

Q. So you might have a mortgage on its face for ten thousand dollars and an actual indebtedness secured by that mortgage for a much larger sum?

A. Yes.

Mr. Cooke: That's all. [505]

Cross-Examination

By Mr. Thompson:

Q. What year did you have the largest number of livestock on the ranch?

A. Well, I wouldn't say for sure, but I think it was 1938 or 1939.

Q. Do you recall how many head of cattle, cows, steers and calves you had at that time?

A. I believe our largest count was around 800.

Q. Did you ever have more than one chattel mortgage on the same livestock at the same time?

A. No, with the exception of that second mortgage to the Federal Land Bank.

Q. Well, that was on the ranch, wasn't it, itself?

A. Yes.

Q. I am talking about the cattle.

A. No.

(Testimony of Reinhold Sadler.)

Q. There was never more than one chattel mortgage on the same cattle at the same time?

A. No.

Mr. Thompson: That's all.

Re-Direct Examination

By Mr. Cooke:

Q. That is since you became a partner. You don't know a great deal about it prior?

A. No, I don't.

Mr. Cooke: That's all. [506]

MR. CLARENCE SADLER

was recalled and having previously sworn, testified as follows on

Cross-Examination

By Mr. Furrh:

Q. Mr. Sadler, you testified that you examined the records of the Federal Land Bank in Berkeley, I believe, in the late fall of 1930, is that correct?

A. It was in 1930 some time, whether it was the latter part—it was in 1930 some time. It may have been '33 or '34 or '35, around that time.

Mr. Furrh: Your Honor, may the record show that we are calling Mr. Sadler on cross-examination?

The Court: It may so show.

Q. You don't remember the exact date then, Mr. Sadler, that you examined the records?

A. Well, I can't say the exact date because I didn't make any notation on my memorandum the exact date I went into the records.

(Testimony of Mr. Clarence Sadler.)

Q. You wrote a letter to your brother Alfred, did you not, in which you informed him that some time during 1932 you had examined the records.

Mr. Thompson: Objected to on the ground that the witness be shown the letter and the letter is the best evidence.

The Court: I think counsel will show the witness the letter.

Q. Mr. Sadler, I show you Defendant's Exhibit "N." If you will notice attached to that letter are certain figures, reflecting that you furnished Alfred with information in regard to the loans [507] that you had obtained from the Federal Land Bank at Berkeley, is that correct?

A. Yes, these are in my handwriting.

Q. That was some time during the summer of 1932?

A. Well, the letter is dated July 28, 1932, yes.

Q. And it was shortly before that that you had been at the bank? A. I presume so.

Q. Now did you go to the bank on any other occasions after that, Mr. Sadler?

A. Yes, I went to the Federal Land Bank before this suit was filed.

Q. During the period from say 1932 up until the time the suit was filed, did you go to the Federal Land Bank on a number of occasions to examine the status of this mortgage? A. No, I did not.

Q. In other words, the only times that you went were at the time you mentioned in this letter of July 28, 1932 and then just prior to the time the suit was filed? A. Yes.

(Testimony of Mr. Clarence Sadler.)

Q. Did you know from any other source about the execution of these various mortgages that have been testified to?

A. No. I called at the Bank of America subsidiary shortly before the suit was filed and made inquiry if there was any outstanding loan on the cattle and as I recall it the man said there was a small loan. [508]

Q. Did you ever make any inquiry at the recorder's office in Eureka concerning these loans on the ranch? A. No.

Q. Did you make any effort at all, except the two occasions that you mention, to ascertain what the status of the various loans on the property was?

A. Well, I asked Alfred from time to time for information.

Q. Did he furnish that information?

A. Well, at various times he told me there were certain outstanding loans. I don't know what loans he mentioned.

Q. You testified that you visited the ranch in 1938, is that correct? A. That is correct.

Q. On that occasion did you observe that Reinhold had built a home out there?

A. I did. As a matter of fact, Mr. Castro stayed at Reinhold's home.

Q. When did you first learn that Reinhold had been taken in as a partner by his father?

A. I did not learn until I received a copy of the Answer.

(Testimony of Mr. Clarence Sadler.)

Q. And your answer, I suppose, would be the same so far as Floyd is concerned? A. Yes.

Q. Did you know anything about the terms or conditions on which Floyd and Reinhold were working at the ranch? [509]

A. Well, I knew that they were running cattle together out there. Alfred told me that, but I didn't know any special terms.

Q. In other words, you knew that Reinhold had his cattle and that Floyd had his cattle.

A. Yes, and that they ran together with the ranch cattle.

Q. Did you ever at any time say anything to either Floyd or Reinhold concerning the interest that you claimed in the ranch?

A. Yes, I mentioned it to Floyd several times.

Q. When was that?

A. Oh, back when he was going to school in California.

Q. Did you ever say anything to him about that after 1938?

A. Well, I didn't see him after 1938.

Q. The first time you saw him after 1938 was in the present case?

A. Yes. I think I also mentioned it to him when he was here in Reno. He was here at the funeral of my brother.

Q. Do you remember when that was?

A. Well, I made so many trips to Reno on investigation purposes.

(Testimony of Mr. Clarence Sadler.)

Q. Where did you have occasion to see him?

A. Oh, here in Reno. I think one time I saw him down in the office of the Public Service.

Q. Do you have in mind any particular conversation you had with him? A. No, I have not.

Q. Just have a recollection of a conversation?

A. Yes. [510]

Q. Did you ever say anything to Reinhold about the claim that you had in the ranch?

A. I may have. I don't recall any specific instance now.

Q. Mr. Sadler, I think you testified on the first occasion on which you observed Exhibit 8, which is the alleged trust agreement, was some time during the year 1918?

A. Yes, it was May or June of 1918 when I returned from Lake Charles, Louisiana.

Q. You observed it, of course, I suppose, as a lawyer, I suppose you observed only two of the individuals named in the instrument were signers?

A. Yes.

Q. Did it ever occur to you that the other persons named in the instrument should also be included?

Mr. Thompson: Objected to; calls for conclusion and invades the province of the Court.

The Court: Objection will be sustained.

Q. Mr. Sader, you have heard the testimony to the effect that beginning in 1932 Reinhold Sadler and his wife joined in the various chattel mortgages which have been introduced in evidence along with Edgar Sadler and Ethel Sadler? A. Yes.

(Testimony of Mr. Clarence Sadler.)

Q. Did you ever have any knowledge of the fact that Reinhold and his wife were joining in those mortgages?

A. Well, I knew they had bought some cattle, that Reinhold had [511] taken his money that he received from the Compensation Commission and invested in cattle and I presumed that his wife had also put up some money because she was teaching school out there.

Q. That is put up money for the purpose of purchasing cattle, is that right?

A. Well, I don't know what they put up, but I presumed they were in partnership in their cattle.

Q. Do you remember how that was first called to your attention?

A. Oh, I think Alfred told me about it.

Q. At what time, do you recall?

A. Well, I know in 1930 I was out to the ranch and I was told that—no, it was in 1933 when I was at the ranch—and I was told by the folks out there that Reinhold had received some money from the State for an accident to his eye.

Q. Did they tell you what disposition he made of that money?

A. I think Reinhold said he invested in some stock, that is my recollection.

Q. You mean cattle?

A. Cattle, yes, livestock.

Q. You testified that on a number of occasions you mentioned to Floyd the fact that you had an interest in this ranch?

A. Yes.

(Testimony of Mr. Clarence Sadler.)

Q. And you testified that one of these occasions was when he was going to school in Oakland?

A. Yes, he used to come out to our place quite often and we [512] asked him up for Sunday dinners.

Q. When was that? Do you recall what years?

A. Well, that was before and after his—it was before, I think, his grandmother passed away, possibly in '28 and '29.

Q. He was in high school?

A. And he was also in Polytech, Oakland Polytech.

Q. What was the other occasion that you mentioned?

A. I think that was when we discussed it over in the Land Office here, when I met him over there one day.

Q. Do you remember what year that was?

A. I don't recall the year.

Q. Can you fix the date approximately?

A. No, I couldn't, because I was in Nevada on a number of occasions. I came up here on investigation work and I also went to Salt Lake and on my return I would stop here to visit with Alfred. It was prior to the time he returned to the ranch.

Q. Some time prior to 1936 or 1937, whenever it was when he returned to the ranch?

A. Yes, I think he was on one of the surveys. He was in the office there with another boy. Alfred was in there too.

(Testimony of Mr. Clarence Sadler.)

Q. Do you remember how the subject matter came up for discussion?

A. No, I don't recall. It may have been we were discussing the ranch and he said, "Well, I may return to the ranch." I said, "Well, how about you and Reinhold buying my interest?"

Q. Do you remember that type of conversation?

A. Well, I remember some conversation with Floyd in Reno. Now whether it was the survey office or some other place, I don't exactly recall.

Q. And you are not sure what you related is the gist of it?

A. Well, as I recall it, it was some discussion about the ranch.

Q. What did he say to your suggestion in regard to his buying?

A. He said, "I don't know if it can be arranged, where the money will come from."

Q. In the conversation that you had in Oakland concerning your interest in the ranch with Floyd, I believe you testified that that took place at your home?

A. Yes.

Q. Who was present?

A. My wife.

Q. Just the three of you?

A. And my son Bruce; he was interested.

Q. And this other conversation, the one that took place here in Reno, you and Floyd and some boy that was accompanying him?

A. Well, I think he was working in the office, I am not sure. I think he was one of the staff.

(Testimony of Mr. Clarence Sadler.)

Q. Are you talking about Floyd now or the individual that was with him?

A. The man that was with him.

Q. Just the three of you?

A. No, Alfred I think was present.

Q. Did you ever have any other conversations with either Floyd or Reinhold in which the question came up as to your interest in [514] the ranch?

A. I don't recall any. I may have had a conversation with Reinhold. I have some recollection of discussing it with Reinhold up there; I don't know, I am not sure.

Mr. Furrh: That's all.

Mr. Thompson: That's all.

MR. FLOYD SADLER

was recalled and having been previously sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. Mr. Sadler, you heard testimony of Clarence Sadler a moment ago? A. Yes.

Q. Concerning having had two conversations with you, one at Oakland and one——

Mr. Thompson: He talked several times at Oakland.

Q. Well, at least one in Oakland and one here in the Land Office. You heard his testimony, did you?

A. Yes.

(Testimony of Mr. Floyd Sadler.)

Q. It was while you were attending school that the first one occurred? A. Yes.

Q. At his home? A. Yes.

Q. In the presence of himself and his wife and his son Bruce. Did you at that time have a conversation with him at which he [515] stated something about your buying his interest in the ranch and your replying that you didn't know where the money was coming from, or words to that effect?

A. No, I told him I never had any intention of going back on the ranch at that time. I was just going to school, getting an education.

Q. The point is whether any such conversation actually occurred? A. I do not recall it.

Q. If you had had such conversation as that, in which he asserted he had an interest in the ranch, would you have gone ahead and put your money in there as you did do? A. I do not think so.

Q. Did you have any other talks with him at his home in Berkeley or Oakland, wherever it was, in which the matter of his having an interest in the ranch property came up?

A. I can't recall any. I went out to his home quite a number of times while I was in school and out to dinner, but the only conversation I can recall that came up, he would ask me how the folks were on the ranch and how things were on the ranch, what I heard in the last letter, etc.

Q. And in reference to conversation in the Land Office here in some year which he does not exactly know which one it was, do you remember any con-

(Testimony of Mr. Floyd Sadler.)

versation there where Alfred was present? Well, do you remember any conversation in the Land Office here in which the matter of Clarence Sadler having an interest in [516] the ranch property came up, being discussed in any way there?

A. I can't remember any conversation we had in the Land Office at any time. I have a faint recollection of Clarence coming in to see Alfred one day at the Land Office. He also came in my office to see me. I was in an office with three other men at that time.

Q. Was that the only occasion when he called at that building or to see you that you just described?

A. Yes.

Q. Was there anything said on that occasion in regard to his having interest in the ranch? Was the ranch mentioned in any way?

A. No, it was not.

Q. I think Mr. Clarence Sadler fixed the time shortly before you returned to the ranch, which I believe was in 1936 or 1937. Does that refresh your recollection in any way as to having any talk with him at that time?

A. Well, while I was in the Land Office at that time, I took the civil service examination for General Land Office surveyor and this visit occurred before I took this civil service examination.

Q. Was it shortly prior, before you returned to the office? A. No, it was two years prior.

(Testimony of Mr. Floyd Sadler.)

Q. And that was the only time he was in there and the only time he had a talk in that building?

A. Yes.

Mr. Cooke: That's all.

Mr. Thompson: No questions.

Mr. Cooke: That is defendant's case, your Honor.

The Court: Defendant rests?

Mr. Cooke: Defendant rests.

Rebuttal Testimony

MR. CLARENCE SADLER

having been previously sworn, testified as follows on

Direct Examination

By Mr. Thompson:

Q. Do you recall any occasion when Ethel Sadler and her daughter, Violet, visited you and your wife in Berkeley? A. Yes.

Q. When was that?

A. In the spring of 1930.

Q. And at that time where did Ethel Sadler and her daughter, Violet, stay?

A. They stayed at our home.

Q. During that time did you have any conversation regarding the Diamond Valley Ranch?

A. We did.

Q. Who was present during the conversation?

A. My wife, Ethel Sadler, and myself.

Q. What was the conversation, as you recall it?

A. We asked Ethel to put the ranch on the mar-

(Testimony of Mr. Clarence Sadler.)

ket for sale and following her return to Eureka she would discuss the matter with Edgar and get a price so we could list the properties with various real estate firms handling ranch properties.

Q. I show you Plaintiff's Exhibit 41. When did you first see that?

A. I first saw that letter when my wife opened it shortly after July 12, 1930.

Mr. Thompson: It is a letter dated July 12, 1930, addressed "Dear Reba," signed "Ethel," which contains the following paragraph: "Edgar said he was willing to sell any time he could received \$65,000 for the ranch alone. He said the way ranches are selling at the present time it is worth it."

Q. I show you a photostat letter dated Reno, Nevada, August 8, 1930, addressed "Dear Clarence," will you state what that is, please?

A. That is a letter I received from my brother Alfred. It is in his handwriting and it is signed by Alfred with his signature. Received in the regular course of mail.

Mr. Thompson: I offer the letter in evidence, your Honor, as Plaintiff's Exhibit 43.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of the offered letter, dated August 8, 1930, on the ground that it is not rebuttal, on the ground that it is hearsay as to the defendant, Edgar Sadler, purporting to be [519] expression of opinion, etc., on the part of Alfred Sadler; that it can't have any tendency to prove the alleged trust as the statute provides; that no trust can be proved unless signed by the parties to be

(Testimony of Mr. Clarence Sadler.)

charged with a trust and in the absence of the signature of Edgar Sadler in the document that is intended to prove any trust, there would be no foundation. It would be incompetent.

The Court: The only point is, is this proper rebuttal?

Mr. Thompson: Well, if the Court please, Ethel Sadler denied any such conversation in 1930 and Mr. Cooke on rebuttal has set forth his evidence which he thinks tends to establish laches on the part of the plaintiff——

The Court: It will be admitted as Plaintiff's Exhibit 43.

PLAINTIFF'S EXHIBIT No. 43

Reno, Nevada

Aug. 8, 1930

Dear Clarence:

Your letter received and contents noted. From what you say, the property would have to be sold for about \$75000 to get the commission and etc. to bring a net of \$65000. I do not know exactly the number of acres in the Diamond Ranch but have an idea it is close to 2500. I can not say how many acres is cultivated but would say that over 1000 is cultivated and would not class the big meadow as cultivated land because same is not plowed very often. I do not know what outside range land could be mentioned because no doubt a person would have to pay Government for grazing on the ranges.

I do not know the number of tons of hay cut on the ranch but do know that some of the fields should

(Testimony of Mr. Clarence Sadler.)

have been reseeded before they would produce like they used to do. Can not say how many acres were reseeded last year and this spring.

The fields that wheat and grain was planted being to reseed to alfalfa, again.

The date in regard to acreage would have to be secured from Edgar and average cut of hay of the cultivated land, the acreage from the meadow land.

What the big idea of the commission transferring you back to Washington. Are they cutting down expenses in the West again and going to direct same from Washington or Chicago. I do not understand why you want to take a trip down to Las Vegas as it will be a year or so before they get started down there from the reports and conditions that I hear. It would be a waste of money to go down there now and I have my doubts that anything could be accomplished. The trip to the Ranch would take four days no doubt.

Enclose find five dollars as a Birthday present to Bruce from Edward, Patricia and myself. Buy something that he might need or some toys that would interest him, Edward says.

We are all well and hope that you, Reba and Bruce are in good health. Not so warm as it was a while back but still somewhat warm during the days. Hope that everything is going all O.K. and with lots of love from us all to you all.

Your Brother,

/s/ ALFRED.

[Endorsed]: Filed Oct. 22, 1946.

(Testimony of Mr. Clarence Sadler.)

Q. Where were you in August of 1930, Mr. Sadler?

A. I made a trip to Los Angeles about that time.

Q. I show you Plaintiff's Exhibit 44 for identification. Will you state what it is, please?

A. Well, it is a copy of letter dated August 11, 1930, and it is a typewritten letter and it is addressed to Edgar A. Sadler, Eureka, Nevada, and it is signed F. Bowen. The name appears typewritten at the bottom of the letter.

Q. When did you receive Exhibit 44 for identification? A. Mr. Owen gave it to me.

Q. And who was Mr. Owen?

A. Well, he was the manager of the Boulder Dam Land Department [520] of some large real estate firm in Los Angeles. Mr. Owen was department specialist in the sale of Boulder Dam or Las Vegas lands and also in ranch lands.

Q. And when did he give it to you?

A. Well, he gave it to me, I think the following day after the letter was typed and sent.

Mr. Thompson: We offer Exhibit 44 for identification in evidence, your Honor.

Mr. Cooke: The defendant, Edgar Sadler, objects to the admission in evidence of Plaintiff's Exhibit 44 for identification, on the ground that it is incompetent and immaterial and irrelevant, does not prove or tend to prove any issue in the case. That it is rebuttal. That it purports to be a copy of letter written by this man Owen to Edgar Sadler. Mr.

(Testimony of Mr. Clarence Sadler.)

Sadler's attention to any such letter as that was not called when on the stand, no notice given to Mr. Sadler's attorneys to produce the original of it. That it is merely a recital by a third party, F. B. Owen, as to what Edgar Sadler's brother, C. T. Sadler, had informed him about the ranch and making inquiry about the terms of the sale. No foundation laid for any such introduction as that.

Mr. Thompson: If the Court please, we do not offer it as letter received by Edgar Sadler. We do not know whether it was received or not, or whether the original of the letter was ever mailed. We offer it to show what Mr. Clarence Sadler did [521] with relation to the sale of the ranch in 1930, after the conversation with Ethel Sadler in Berkeley and the receipt of the letter from Ethel Sadler, giving the price of \$65,000 for the ranch and the letter dated August 8, 1930, from Alfred Sadler, merely corroborating the entire incident, your Honor.

The Court: Objection will be sustained.

Q. Mr. Sadler, did you have any conversation with John Eccles during the years 1945 or 1946?

A. I did.

Q. When did the conversation take place?

A. The conversation took place in the holidays of 1945 at my home in Berkeley.

Q. Who was present during the conversation?

A. John Eccles, his wife, Vera Eccles, and my wife, Doris Reba Sadler, and myself.

Q. Is that the only conversation you had with

(Testimony of Mr. Clarence Sadler.)

John Eccles during the year 1945 or 1946, with the exception of the days he was present here at the trial? A. That is correct.

Q. During that conversation, did you say to John Eccles, "Edgar always told me I had nothing to do with the ranch? A. No.

Q. Did you say anything to him that carried the same import or meaning? A. No. [523]

Q. Immediately after Mr. Eccles visited you, did you write me a letter in which you mentioned his visit?

A. I would say two or three days afterwards.

Q. And by referring to that letter you would be able to refresh your recollection as to what the conversation was at that time? A. Yes sir.

Q. I show you a letter dated January 2, 1946, addressed to Mr. Bruce R. Thompson and signed C. T. Sadler, is that the letter to which you refer?

A. It is.

Q. By referring to that letter, refreshing your recollection from it, will you state the substance of the conversation you had with Mr. John Eccles at the time specified?

A. Yes. Well, I asked John if he wanted to see the house and he said "Sure", so I took him down in the basement, through the dining room and into the kitchen——

Q. I mean the conversation relating to the ranch.

A. I am going to connect it up this way. While we were down in the basement John said, "What are you doing to your brother?" I said, "Well, I am not doing anything." He said, "Well, you

(Testimony of Mr. Clarence Sadler.)

filed a suit against him." I said, "Yes, I had to file a suit against him because he said I had no interest in the ranch after Alfred's death," and we went upstairs and I asked him if he would like to see a copy of the complaint and answer and [523] he said yes, so I gave it to him and he looked at them and then he said, "Well, why don't you work out a settlement?" I said, "Well, the matter is in court now. If Edgar would like to make a settlement, he should come to me." And that was the end of the conversation, and I reported the facts to you.

Q. Mr. Sadler, I show you Defendant's Exhibit "J", which is a letter dated May 6, 1944, you wrote to Edgar Sadler. The first sentence of the letter is as follows, or the first paragraph: "I have heard that since Alfred's death you have repudiated the trust agreement of March 2, 1918. It is hard for me to believe that that can be true, for we have treated you right in every way." Now to what did you refer by your statement that you had heard since Alfred's death that he had repudiated the trust agreement of March 2, 1918?

A. I referred to a statement that Edgar made in Mr. Kearney's office during my absence in Reno. I returned to San Francisco after my brother's death and Edgar called at Mr. Kearney's office and Mr. Kearney, as I understand, showed him a photostat of the trust agreement. At that time Edgar denied that he had signed the trust agreement.

Mr. Thompson: That's all.

(Short recess.)

MR. CLARENCE SADLER

resumed the witness stand on

Cross-Examination

By Mr. Furrh:

Q. Mr. Sadler, you testified that you heard by way of Mr. [524] Kearney's office that Edgar Sadler had repudiated this alleged trust agreement and that is what prompted you to write this letter of May 6, 1944, which has heretofore been introduced into evidence, marked Defendant's Exhibit "J," is that true? A. Yes.

Q. Is that the first intimation you had that Edgar had repudiated this trust?

A. The agreement itself, yes. Prior to Alfred's death he said I had no interest in the ranch.

Q. Isn't that in effect the same thing?

Mr. Thompson: Objected to as argumentative.

The Court: Objection sustained.

Q. Mr. Sadler, with reference to this visit that Ethel Sadler and her daughter had down at your home during 1930, I believe you testified that she actually stayed at your home? A. Yes.

Q. Did she stay over night?

A. She stayed about a week.

Q. At your home? A. Yes.

Q. Isn't it true that she was staying at her brother's home?

A. Yes, but she came out to our place and stayed about a week.

Q. Had all her meals there?

A. Usually, yes.

(Testimony of Mr. Clarence Sadler.)

Q. You heard Mrs. Ethel Sadler testify that she was staying [525] at her brother's at the time, did you not?

A. She stayed part of the time at her brother's and then she stayed at our place.

Q. But you heard her testimony to the fact that she said she did not stay with you?

A. Let me quote the facts to you. She was staying at her brother's and she called my wife one day and asked if she could come over. My wife said that we were going to Yosemite Valley, I had some business down the valley and was making a trip down in the valley, and Mrs. Beatty, the stenographer in our office, wanted to go along with me and I said she could and when Ethel telephoned, after my wife told her she was going down the valley she asked if she could go along and my wife explained to her that she couldn't because we were taking Mrs. Beatty and Bruce and we had to put him in the back and she said, "Well, I will come over when you return" and she asked my wife the day we were returning and two hours after we returned to Berkeley Ethel came to the house and she stayed there for approximately a week.

Q. Mr. Sadler, in connection with this information you obtained through Mr. Kearney's office, concerning the repudiation of the trust of Edgar Sadler, will you state where you got that information?

A. Well, it was given to me by Mr. Kearney himself and Alfred Sadler and Mrs. Kathryn Powers Sadler and Patricia Sadler. [526]

(Testimony of Mr. Clarence Sadler.)

Q. By what means did they communicate? While you were down in Reno?

A. No, I returned to Reno. I had to go back to San Francisco, make some surveys for the WPB, and I returned later on and they gave me the information.

Q. Just what did they say?

A. They said that Mr. Kearney showed them a copy of it, of the trust, and Mr. Kearney asked him if that was his signature and he said that wasn't his signature, that he had never signed such an agreement.

Q. That was shortly before this letter was written, is that true, the exhibit?

A. Yes, I made several trips up here shortly after my brother's death.

Mr. Furrh: That is all.

Mr. Thompson: That is all. We rest, your Honor.

Mr. Cooke: We would like to call Edgar Sadler for a statement as to what took place in Mr. Kearney's office.

MR. EDGAR SADLER

having been previously sworn, testified as follows:

Direct Examination

By Mr. Cooke:

Q. Mr. Sadler, you heard the testimony of Clarence Sadler in regard to what he states took

(Testimony of Mr. Edgar Sadler.)

place, or what Mr. Kearney stated took place in his office as to the alleged trust agreement?

A. Yes sir, I did. [527]

Q. Were you in Mr. Kearney's office more than once in connection with that matter?

A. Which matter do you mean?

Q. This trust agreement or the claim of Mr. Sadler on this property?

A. Never was in his office on that at all.

Q. In Mr. Kearney's office?

A. No, not on that subject.

Q. On what subject?

A. When we went up to see what Mrs. Alfred Sadler was going to do about a proposition I offered on the ranch.

Q. To take over Alfred's interest in it, 'is that it?

A. Yes, take Alfred's interest over.

Q. You didn't go up there on anything in regard to Clarence Sadler having any claim?

A. No sir, didn't go up there.

Q. But you did go up there to see about a proposition you previously had with Alfred and at that time was anything said by either you or by Mr. Kearney in regard to the claim of Clarence Sadler?

A. No.

Q. Did Mr. Kearney show you this alleged trust agreement, Exhibit "L" attached to the complaint, marked Exhibit 8 in this case?

A. No, he never showed it to me. [528]

(Testimony of Mr. Edgar Sadler.)

Q. Did he show you any paper purported to be signed by you in which you denied the signature?

A. No sir.

Mr. Cooke: I think that is all.

Cross-Examination

By Mr. Thompson:

Q. Who was present at the time you talked to Mr. Kearney in his office, Mr. Sadler?

A. Well, we were up there twice. My son and myself were up first and then we went up again and Alfred's wife was there and the daughter and the son.

Q. You said that Mr. Kearney didn't show you Exhibit 8. You know what Exhibit 8 is, don't you?

A. Yes, I know what it is.

Q. Did he show you a photostatic copy of it?

A. No sir.

Q. Didn't Mr. Kearney ask you if you had not signed such an agreement?

A. He never asked me anything.

Q. He didn't ask you that?

A. No. In fact, we didn't know anything about that at all.

Q. You heard your son, Reinhold Sadler, testify, did you not, Mr. Sadler? Didn't you hear Reinhold Sadler testify that he had seen a photostatic copy of that agreement in Mr. Kearney's office?

A. I don't think I did. [529]

(Testimony of Mr. Edgar Sadler.)

Q. Were you in Mr. Kearney's office on more than one occasion discussing that matter?

A. Of Alfred Sadler?

Q. Yes. A. Yes, twice.

Q. And were the same parties present on each occasion? A. No.

Q. Who were present the first time?

A. My son.

Mr. Cooke: Which son?

A. Reinhold.

Q. Reinhold and you and Mr. Kearney were present the first time? A. Yes.

Q. And when was that?

A. Oh that was, oh, I don't know, a month or so after Alfred died, somewhere along in there.

Q. When was the second occasion?

A. Well, that was about the same time.

Q. Later than the first conference?

A. A later date.

Q. And at that time Mr. Kearney and you and Reinhold and Mrs. Kathryn Sadler and her daughter Patricia were present is that right?

A. Yes, and the boy, Edward. [530]

Q. Mrs. Kathryn Sadler's son?

A. Yes sir.

Mr. Thompson: That is all.

Mr. Cooke: Defendant rests.

Mr. Thompson: Mrs. Kathryn Sadler, will you take the stand?

MRS. KATHRYN SADLER

having been previously sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. Were you present in Mr. Kearney's office in April, 1944? A. Yes, I was.

Q. And who else was present at that time?

A. My daughter Patricia and son Edward and Edgar and Reinhold.

Q. And at that time was Exhibit 8 present in Mr. Kearney's office?

A. I had turned it over to him.

Q. At that time was Exhibit 8 shown to the persons who were present there?

A. I don't remember that it was shown, but Mr. Kearney asked Edgar if he remembered signing any agreement or if he did sign an agreement and he said no, he hadn't signed anything.

Mr. Thompson: That's all.

Mr. Cooke: No cross. [531]

Mr. Thompson: Plaintiff rests, your Honor.

The Court: I think that is all we have at this time.

(The court will be in recess so far as this case is concerned. The case will stand submitted after the briefs have been filed. All witnesses may be excused.)

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, in and for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the proceedings had and the testimony adduced at the trial of the case, entitled, "Clarence T. Sadler, Plaintiff, vs. Edgar A. Sadler, Defendant", No. 371, held at Reno, Nevada, on the 14th, 15th, 16th, 17th, 18th, 21st and 22nd days of October, 1946, and that the foregoing pages, numbered 1 to 532 inclusive, comprising two volumes, constitute a full, true and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: No. 11715. United States Circuit Court of Appeals for the Ninth Circuit. Edgar A. Sadler, Appellant, vs. Clarence T. Sadler, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed August 27, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11715

EDGAR A. SADLER,

Defendant and Appellant,

vs.

CLARENCE T. SADLER,

Plaintiff and Respondent.

ADOPTION OF POINTS ON WHICH APPELLANT
WILL RELY ON APPEAL

To: The Clerk of the above-entitled Court;

Clarence T. Sadler, plaintiff and Respondent,
Springmeyer & Thompson, Esqrs., attorneys
for said plaintiff and respondent:

Pursuant to the provisions of Subdiv. 6 of Rule 19 of Rules of Practice of the above-entitled court, the appellant hereby adopts as his statement of the Points on which he intends to rely on the appeal, the Statement of Points appearing in the Transcript of the Record, and the Record as certified by the Clerk of the trial court be printed in its entirety.

Respectfully submitted,

/s/ H. R. COOKE,

/s/ JOHN D. FURRH, Jr.,

Attorneys for Appellant.

Dated: September 5, 1947.

Service, by copy, of the foregoing Adoption admitted this 5th day of September, 1947.

/s/ SPRINGMEYER & THOMPSON,
Attorneys for Plaintiff and
Respondent.

[Endorsed]: Filed Sept. 6, 1947.

No. 11,715

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EDGAR A. SADLER,

Appellant,

VS.

CLARENCE T. SADLER,

Appellee.

APPELLANT'S OPENING BRIEF.

H. R. COOKE,

JOHN D. FURRH, JR.,

First National Bank Building, Reno, Nevada,

Attorneys for Appellant.

FILED

DEC 8 1947

PAUL P. O'BRIEN,

Subject Index

	Page
Statement as to jurisdiction	1
Statement of the case	2
Argument	6
Edgar L. Plummer, grandson, under the will of Reinhold Sadler, deceased, and under Nevada law as to Louisa Sadler, deceased, took and had an undivided 25% interest at time this suit was commenced, but without his being before the court the trial court awarded him only a 13% interest (Points 1, 2, 3, R. pp. 106-107; also Point 12, R. p. 112)	6
Specification of Error No. I	6
The trial court erred in assuming jurisdiction and denying defendant's motions for dismissal of action for failure of complaint to state a claim against defendant upon which relief could be granted, there being an absence of legal representative of the estate of Louisa Sadler, surviving wife and an heir of Reinhold Sadler, deceased, and also absence of Edgar L. Plummer, grandson of said deceased, —both indispensable parties (Points 1, 2, 3, R. pp. 106-107; also Point 12, R. p. 112)	11
Specification of Error No. II	11
The trial court erred in holding it could take possession of property now and for many years past in the possession of the State District Court of Nevada in and for Ormsby County (Point 4, R. p. 107)	33
Specification of Error No. III	33
Trial court erred in overruling defendant's objections based upon plaintiff's amended complaint affirmatively showing that he had no cause of action in that the decree of March 2, 1918 annexed to his complaint decreed plaintiff had no interest or equity in the Diamond Valley Ranch and plaintiff's action therefore is merely an attempt by intrinsic matter to impeach and nullify said decree (Points 4, 5, 6, R. pp. 107-108)	36
Specification of Error No. IV	36

	Page
The trial court erred in overruling defendant's objections that plaintiff's case is fatally deficient in that there isn't the slightest evidence of alleged oral trust agreement made prior to March 2, 1918 (Point 6, R. p. 108).....	42
Specification of Error No. V	42
The trial court erred in not applying the rule that burden of proving the alleged trust is upon plaintiff and the proof of essentials of the alleged trust must be clear, satisfactory and unequivocal (Points 5, 6, 7, R. pp. 107-109).....	44
Specification of Error No. VI	44
The trial court erred in not applying the rule that evidence to defeat a deed and establish a trust must be clear, and attended with no uncertainty (Point 7, R. p. 108).....	52
Specification of Error No. VII	52
The trial court erred in not holding that the alleged trust, if any (amended complaint, par. 6, R. p. 51), not being in writing, is void (Point 7, R. p. 108).....	53
Specification of Error No. VIII	53
The trial court erred in not applying the rule that writing must contain within itself and without the aid of parol evidence, all that is necessary to enable the court to declare a trust (Points 1, 2, 3, 6, R. pp. 106-108).....	55
Specification of Error No. XIII	55
The trial court erred in not holding that plaintiff's alleged cause of action is barred by his laches in deferring suit for upwards of 25 years and until the death of Alfred Sadler who would obviously have been a material witness (Points 9, 10, R. pp. 109-110)	56
Specification of Error No. IX	56
Trial court erred in finding Reinhold Sadler was the owner of any interest in said ranch because the only claim of evidence that Reinhold Sadler owned any interest in Diamond Valley Ranch when he died is that he owned 4000 shares of stock of Huntington and Diamond Valley Livestock and Land Company, and the only evidence of ownership of said shares being Exhibit 17, the alleged	

	Page
inventory, which is not verified by the administratrix, Louisa Sadler (Point 4, R. p. 107).....	66
Specification of Error No. X	66
Trial court erred in giving effect to Exhibit 8 because said Exhibit 8 purports upon its face to be a memorandum of agreement to be signed by Edgar, Alfred, Bertha, Louisa and Clarence Sadler, and being at most, signed by only two of them, the instrument is incomplete and invalid for any purpose (Points 3, 6, R. pp. 107-108).....	69
Specification of Error No. XI	69
The trial court erred in not applying the rule that plaintiff cannot prevail except upon theory that as heir of Reinhold Sadler, he (as well as the other five) had an equitable in- terest or estate in the Diamond Valley Ranch. The Statute N.C.L., Sec. 1527, includes equitable estates and hence said Exhibit 8 is void under said statute because not signed by all holders of beneficial interest (Points 1, 2, 3, 6, R. pp. 106-108)	72
Specification of Error No. XII	72

Table of Authorities Cited

Cases	Pages
Alison v. Goldtree (Cal.), 49 P. 571.....	27
Allen v. Hendrick (Ore.), 206 P. 733	55
Baird v. Peoples Bank & Tr. Co. (C.C.A. 3rd), 120 F. (2d) 1001.....	10, 24
Baird et al. v. Peoples Bank (D.C. N.J.), 31 F. Supp. 622	18
Bank of Calif. v. Supr. Ct. (Cal.), 106 P. 879.....	9, 26
Barber v. Burrows, 61 Cal. 404	71
Barney v. Baltimore City, 6 Wall. 280, 18 L. Ed. 825.....	31
Bayle-Lacoste & Co. v. Supr. Ct. (Cal.), 116 P. (2d) 458..	27
Bland v. Fleeman (D.C. Ark.), 29 F. 669	16
Bliss v. Bliss (Ida.), 119 P. 451	51
Brissell v. Knapp (C.C.A. Nev.), 155 F. 809	65
Brown v. Christman (C.C.A. D.C.), 126 F. (2d) 625	9, 17
Buss v. Prudential Ins. Co. (C.C.A. 8th), 126 F. (2d) 960	19
Byers v. McAuley, 149 U. S. 608, 37 L. Ed. 867.....	34
Castro v. Gaffey (Cal.), 31 P. 363	70, 77
Chenoweth v. Lewis (Ore.), 39 Pac. St. Reports 150, 9 Ore. 152	74
Chicago etc. Co. v. Adams County (C.C.A. 9th), 79 F. (2d) 816.....	16
Chidester v. City of Newark (C.C.A. 3rd), 162 F. (2d) 598	13
Coleman v. Coleman (Ariz.), 61 P. (2d) 441	76
Commercial etc. Ins. Co. v. Lawhead (C.C.A. 4th), 62 F. (2d) 928	22
Cons. Water Co. v. San Diego (C.C.A. 9th), 93 C. 849	10, 16
Cooney v. Pedroli, 49 Nev. 55, 235 P. 637	63
Coyle v. Lamb (Cal.), 55 P. 901	64
Crutcher v. Joyce (C.C.A. 10th), 134 F. (2d) 809.....	14
Dalton v. Dalton, 14 Nev. 419	49, 52
Davis v. Henry (C.C.A. 6th), 266 F. 261.....	21
Davis v. Heynes (Kans.), 181 P. 566	66
Dunn v. Dunn (Ida.), 83 P. (2d) 471.....	50
Edenborn v. Witton (C.C.A. 5th), 74 F. (2d) 374	19
Estate of Smith (Pa.), 27 A.S.R. 641	45

TABLE OF AUTHORITIES CITED

v

	Pages
Farmers etc. Co. v. Winthrop, 202 N.Y.S. 456, modified, 144 N.E. 686	43
Feeney v. Howard (Cal.), 21 P. 984	56
First Natl. Tr. & Sav. Bk. v. Supr. Ct. (Cal.), 121 P. (2d) 729	28
Fortner v. Cornell (Ida.), 163 P. (2d) 299.....	57
Franz v. Buder (C.C.A. 8th), 11 F. (2d) 854	10, 31
Frederick v. Haas, 5 Nev. 389	49, 52
Freeman v. Hopkins (C.C.A. Cal.), 32 F. (2d) 756.....	63
Gevin v. Calegaris (Cal.), 73 P. 851	69
Gill v. Colton (C.C.A. 4th), 12 F. (2d) 531.....	65
Gulling v. Washoe County Bank, 29 Nev. 257, 89 P. 25....	40
Halpin v. Savannah River etc. Co. (C.C.A. 4th), 41 F. (2d) 329	25
Houser v. Hobart (Ida.), 43 L.R.A. (N.S.) 410, 127 P. 997.....	72, 77
Humphrey v. Hudnall (Ill.), 84 N.E. 203	55
Hutchens v. Security Tr. & Sav. Bk. (Cal.), 281 P. 1026..	29
In re Foley (C.C. Nev.), 76 F. 390	35
In re Ralston's Estate (Cal.), 37 P. (2d) 76.....	49
Jackson v. Torrence (Cal.), 23 P. 695	71
Keegan v. Humble Oil & Ref. Co. (C.C.A. 5th), 155 F. (2d) 971	13
Kellogg etc. Co. v. Dean El. Co. (D.C. Ohio), 231 F. 194	51
Kendrick v. Kendrick (C.C.A. 5th), 16 F. (2d) 744, cert. denied, 71 L. Ed. 877	15
Kleinclaus v. Dutard (Cal.), 81 P. 516.....	63
Lake v. Dowd (Cal.), 270 P. 212	30
Lutz v. Kenney, 23 Nev. 279, 46 P. 257.....	68
Mabry v. Scott (Cal.), 124 P. (2d) 659.....	26
Marvel v. Marvel (Nebr.), 97 N.W. 640, 113 A.S.R. 792....	49
McArthur v. Scott, 113 U.S. 340, 28 L. Ed. 1015.....	23
McLeod v. Lee, 17 Nev. 103, 28 P. 124.....	37
McPherson v. Parker, 30 Cal. 455, 89 A.D. 129.....	26
Meegan v. Boyle, 19 How. 130, 15 L. Ed. 577.....	69

	Pages
Miller v. Hathaway, 27 Cal. 119	73, 76
Miller v. Mangus (C.C.A. 10th), 125 F. (2d) 507.....	12
Miller v. Walser, 42 Nev. 499, 181 P. 437.....	63, 64, 65
Mitau v. Roddan (Cal.), 84 P. 145, 6 L.R.A., N.S., 275....	30
Mitchell v. O'Neale, 4 Nev. 504.....	53
Moore v. DeBernardi, 47 Nev. 46, 220 P. 544.....	51
Moore v. Fidelity Tr. Co. (C.C. Pa.), 134 F. 489.....	35
Morrill v. Tehama M. & M. Co., 10 Nev. 125.....	70
Morrow v. Matthew (Ida.), 79 P. 196.....	50
National Licorice Co. v. National Labor Rel. Board, 309 U.S. 350, 84 L. Ed. 799	32
Newman v. Schwerin (C.C.A. 6th), 61 F. 865	23
Noble Gold M. Co. v. Olsen, 47 Nev. 448, 66 P. (2d) 1005	64
Norfleet v. Hampson (Ark.), 209 S.W. 651.....	64
O'Brien v. Markham (D.C. Cal.), 17 F. Supp. 633.....	15
Pacheco v. Mello (Wash.), 247 P. 927.....	47
Philipbar v. Derby (C.C.A. 2nd), 85 F. (2d) 27.....	22
Puder v. Agler (D.C. Ohio), 242 F. 95	34
Robertson v. Burrell (Cal.), 42 P. 1086	57, 58
Rogers v. Penobscott Co. (C.C.A. 8th), 154 F. 606	22
Root v. Kuhn (Cal.), 197 P. 150	46
Ryan v. Kelsey (C.C.A. 3rd), 259 F. 945, 7 A.L.R. 234....	34
Ryan v. Seaboard etc. Co. (C.C. Va.), 89 F. 397	22
Samuel Goldwyn, Inc. v. United Artists (C.C. Del.), 113 F. (2d) 703	12
Shields v. Barrow, 17 How. 130, 15 L. Ed. 158.....	10, 13
Simon v. Shaffer (D.C. Okla.), 11 F. Supp. 450.....	13, 20
Skeen v. Marriott (Utah), 61 P. 296.....	50
Smith v. Bank of California (Cal.), 65 P. (2d) 1361.....	29
Smith v. Foley (C.C. Nev.), 80 F. 949	35
Smith v. Kessler (Ida.), 127 P. 172	38
State v. Board, 5 Nev. 317	68
State of Washington v. United States (C.C.A. 9th), 87 F. (2d) 421	10, 12, 18, 21
Stevens v. Smith (C.C.A. 6th), 126 F. 706	15, 22

TABLE OF AUTHORITIES CITED

vii

	Pages
Talbutt v. Security Tr. Co. (D.C. Ky.), 22 F. Supp. 241	24
Tunis v. Withrow (Ia.), 77 A. D. 117	68
Vore v. Ephraim (Cal.), 159 P. 719	38
Waterman v. Canal-Louisiana Bk. & T. Co., 212 U.S. 33, 54 L. Ed. 80	34
William v. Woodruff (Colo.), 85 P. 90	56

Statutes

Code of Civil Procedure, Section 389	26
Nevada Compiled Laws:	
Section 1527	53, 72, 75
Sections 8524-8527	5
Section 8794	37
Section 8881	37
Section 9922	9
Section 8797	38

Texts

23 A.L.R. 1502	53
1 C. J. 631, Section 93, and N. 50	32
1 C. J. 1107, Section 277	24
2 C. J. 363, Section 109, and N. 91	68
21 C. J. 215	65
22 C. J. 957, Section 1183, and N. 16	69
27 C. J. 202, Section 151	72, 75
27 C. J. 202, N. 37	74
34 C. J. 959, Section 1363 and N. 27, 28	38
34 C. J. 1157, Section 1639 and N. 33	41
34 C. J. 1158, Section 1640 and N. 43	40
51 C. J. 283, Section 280, and N. 54	39
65 C. J. 231, Section 21, and N. 68	46
65 C. J. 257, Section 38, and N. 82-89	48
65 C. J. 260, Section 41, and N. 9	55
65 C. J. 264, Section 46, and N. 84	47
65 C. J. 270, Section 50, and N. 43-44	46

	Page
65 C. J. 271, Section 51 and N. 50	47
65 C. J. 265, Section 46-47, and N. 16	46
65 C. J. 266, Section 47	55
65 C. J. 268	43
65 C. J. 282, Section 62 and N. 92-93	47
65 C. J. 356, Section 131 and N. 91-93	21
65 C. J. 510, Section 261 and N. 53	49
65 C. J. 896, Section 791, and N. 48	65
65 C. J. 899, Section 795, and N. 10	12
1 C. J. S. 665, Section 37, and N. 62	32
1 C. J. S. 1308, Section 102, and N. 99	25
2 C. J. S. 961, Section 21	68
30 C. J. S. 555, Section 128, and N. 91	57
32 C. J. S. 1060, Section 1923	52
37 C. J. S. 577, Section 69, and N. 18.....	75
37 C. J. S. 587, Section 81, and N. 47.....	76
5 R. C. L. 679, Section 54, and N. 6	39
26 R. C. L. 1197, Section 32, and N. 13, 14	54
26 R. C. L. 1200, Section 36, and N. 18, 19	46
26 R. C. L. 1203, Section 44 and N. 5	45
26 R. C. L. 1244, Section 90 and N. 3, 5	48
26 R. C. L. 1244, Section 91, and N. 6, 7	54
2 Moore's Federal Practice 2142	33
2 Page on Contracts 2191, Section 1256, and N. 1	76
2 Page on Contracts 2293, Section 1327	77
Perry on Trusts, Section 79	73
Perry on Trusts and Trustees, 7th Ed., pages 90-92.....	78
Simpkins, Federal Practice, 330 et seq.	33

No. 11,715

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

EDGAR A. SADLER,

VS.

CLARENCE T. SADLER,

Appellant,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

Clarence T. Sadler, a citizen of California and resident of Berkeley, said state (hereinafter referred to as "plaintiff"), on September 6, 1944 filed his complaint (R. p. 2) against Edgar A. Sadler, a citizen of Nevada and resident of Eureka County, said state (hereinafter referred to as "defendant"), in the United States District Court for the District of Nevada, alleging (R. p. 2) the amount involved exceeded \$3000.00 exclusive of interest and costs. On February 2, 1945 plaintiff filed amended complaint. (R. p. 48.) The record shows (R. p. 115) defendant made three separate motions for dismissal, all of which were overruled by the trial Court. Defendant

filed his answer November 17, 1945. (R. p. 62.) Trial was had to the Court without a jury and judgment and decree was entered for plaintiff and against defendant on June 19, 1947 (R. p. 99), and within 30 days thereafter, to-wit: July 16, 1947, notice of appeal to this Court was duly given. (R. p. 103.) On July 12, 1947 bond for costs on appeal was furnished by defendant and filed. (R. p. 104.)

The jurisdiction of the District Court of the controversy arose under Section 24 of the Judicial Code (28 U.S.C.A., Sec. 41) as amended, 1946 Cumulative Annual Pocket Parts, page 30.

The Circuit Court of Appeals has jurisdiction of this appeal pursuant to Section 128 (a) of the Judicial Code, 28 U.S.C.A., Section 225, as amended 1946, Cumulative Annual Pocket Parts, page 129; Rules 73 and 75 of Federal Rules of Civil Procedure of the United States. This appeal is of right. (Authorities, *supra*.)

STATEMENT OF THE CASE.

Reinhold Sadler, a former Governor of Nevada (1898-1902) died January 29, 1906, at which time (as alleged (R. p. 48) by plaintiff, but denied (R. p. 62) by defendant) he owned "certain shares of stock in two corporations, and was also the owner of Diamond Valley Ranch in Eureka County, Nevada, together with the livestock, ranch equipment and other personal property on said ranch. He left a will which was admitted to probate on March 24, 1906 and the

surviving wife Louisa Sadler was appointed administratrix and she qualified, but nothing further was done. (R. p. 149.) Louisa Sadler died intestate (R. p. 50) on August 6, 1923. No administration on her estate was had. There were five children (R. p. 49), viz.: Wilhelmina Sadler Plummer, who died September 5, 1903, leaving a son, Edgar L. Plummer; Edgar A. Sadler, defendant; Alfred R. Sadler, who died March 5, 1944, and whose wife Kathryn Powers Sadler was appointed administratrix of his estate; Bertha Sadler, who died intestate and no proceedings for administration of her estate; and Clarence T. Sadler, the plaintiff.

In December, 1915 a quiet title suit was filed in the State District Court of Eureka County, Nevada, bringing in (R. p. 50) with others, Louisa Sadler, Edgar A. Sadler and Clarence T. Sadler. On February 14, 1918 (R. p. 18) a stipulation by all parties was made and filed, consenting that Edgar Sadler and Alfred Sadler be decreed to be the owners of all the Diamond Valley Ranch and that none of the other parties had any right, title or estate in said property or any part thereof. Said stipulation is Ex. C annexed to plaintiff's complaint and made a part thereof. (R. p. 18.) Decree was thereupon entered (R. pp. 23-31) and Edgar Sadler and Alfred Sadler were adjudged true and lawful owners of the lands described in Par. III of said decree. (R. pp. 31-32.) Said decree was entered (R. p. 34) on March 2, 1918 and (with said stipulation) is made part of plaintiff's case before this Court.

On March 2, 1918 (denied by defendant, but as found by the trial Court) the "Agreement", Exhibit L (R. p. 41), was made. This document was termed by plaintiff as the "crux" of his case. The evidence as to defendant ever having signed or seen said document, or even heard of its claimed existence, until the trial, is conflicting.

On March 2, 1918 defendant and Alfred R. Sadler borrowed \$16,500.00 from the Washoe County Bank, using \$15,000.00 thereof to purchase the said Diamond Valley Ranch and \$1650.00 was used to pay off lawyers' fees in the quiet title suit. To obtain the money Edgar and Alfred signed a note and mortgage on said ranch and a chattel mortgage covering 200 head of cattle belonging (as we claim) to Edgar exclusively. Edgar at once took possession and with his family continuously occupied said ranch, his sole occupation thereon being cattle raising, running from several hundred to six or seven hundred head. Neither Alfred nor plaintiff spent any time on the ranch from March 2, 1918 to the time of commencement of this action, except that Alfred had been there three or four times since March 2, 1918, and that plaintiff stopped off there on several occasions when on a duck hunt or making a trip through Nevada to Utah.

According to plaintiff, his first contract with Edgar about plaintiff's having any interest in the ranch was in July, 1938. Both Edgar (R. pp. 224-226) and Ethel (R. p. 461) testified Edgar then told Clarence he (Clarence) had nothing to do with the ranch.

On July 28, 1932 plaintiff wrote Alfred (Ex. N, R. p. 573) complaining of Edgar and charging that he was in effect misappropriating or even embezzling some of the proceeds and moneys now claimed to be belonging to the alleged trust.

This action was not commenced until September 16, 1944, more than 12 years after plaintiff (vide said Ex. N) had both notice and knowledge that the person plaintiff now claims was his trustee had been unlawfully appropriating some of the alleged trust res.

On September 24, 1937, 7 years prior to commencement of the action, plaintiff learned (Ex. 39, R. p. 370) of Edgar selling some 800 head of cattle and receiving \$48,000.00 for same and that Edgar kept the whole thereof.

The defenses of Edgar were (R. p. 62):

1. Denial of the alleged trust.
2. Statute of Limitations (R. pp. 66-67—first affirmative defense); defendant having, to plaintiff's knowledge, repudiated the alleged trust 20 years or more prior to the commencement of action. (Nevada Statute of Limitations, N.C.L., Secs. 8524-8527.)
3. Laches (R. pp. 67-74) based upon plaintiff's failure to seasonably commence action after knowledge that defendant repudiated and denied any trust, lulling and misleading defendant to his irreparable damage if plaintiff be permitted to now have his action.

4. No consideration for the alleged trust. (R. p. 75.)

5. Trust agreement as alleged (R. pp. 75-76) by plaintiff, being in part not in writing and the same relating to real property, was void under Nevada Statute of Frauds, N.C.L., Section 1527.

6. Alleged trust agreement (R. p. 76), if ever made, offended the rule against perpetuities.

ARGUMENT.

EDGAR L. PLUMMER, GRANDSON, UNDER THE WILL OF REINHOLD SADLER, DECEASED, AND UNDER NEVADA LAW AS TO LOUISA SADLER, DECEASED, TOOK AND HAD AN UNDIVIDED 25% INTEREST AT TIME THIS SUIT WAS COMMENCED, BUT WITHOUT HIS BEING BEFORE THE COURT THE TRIAL COURT AWARDED HIM ONLY A 13% INTEREST.

(Points 1, 2, 3, R. pp. 106-107; also Point 12, R. p. 112.)

SPECIFICATION OF ERROR NO. I.

The foregoing is established by the fact that the trial Court found (R. p. 94) that plaintiff was entitled to 29%, Edgar and Alfred Sadler being in precisely same position as Clarence, the trial Court finding then is that Edgar Sadler and the Alfred Sadler Estate were each entitled to 29%; thus disposing of 87% of the whole estate and leaving but 13% to Edgar L. Plummer who was entitled to share equally.

Governor Sadler died January 29, 1906. (R. p. 48.) His will was made September 28, 1881. (R. p. 8.) Wilhelmina (referred to as "Minnie", R. p. 49), was

named one of devisees. She died September 5, 1903. (R. p. 49.) Edgar L. Plummer is the only child of Wilhelmina. Had she survived her father she would have taken at his death on January 29, 1906, an undivided one-fifth or 13.333% of 66.666% of said estate—there being then living one sister and three brothers, viz.: Bertha, Edgar, Alfred and Clarence (Louisa, the widow, being willed the remaining one-third or 33.333%).

Bertha died without issue on April 29, 1921 (R. p. 49) and Louisa Sadler died August 6, 1923, owning said 33.333% of the whole of said estate, in addition to which she took an undivided $\frac{1}{5}$ th or 20% of the 13.333% of the Bertha lapsed devise amounting to 2.666%, making a total of 35.999% belonging to her.

Therefore the total belonging to Edgar L. Plummer, as sole heir of his mother Wilhelmina, is 15.999%, plus an undivided one-fourth of the estate of his grandmother, Louisa, or 8.999%, making a total of 24.998%.

To further elucidate, we submit the following schedule:

To:

Louisa Sadler (widow)	$\frac{1}{3}$ or	33.333%
Edgar Sadler (son)	$\frac{1}{5}$ or	13.333%
Alfred Sadler (son)	$\frac{1}{5}$ or	13.333%
Bertha Sadler (daughter)	$\frac{1}{5}$ or	13.333%
Clarence Sadler (son)	$\frac{1}{5}$ or	13.333%
Edgar L. Plummer (grandson)	$\frac{1}{5}$ or	13.333%

Bertha's devise lapsed—adding $\frac{1}{5}$ of her 13.333% or 2.666% to each of the following survivors, as follows:

Edgar Sadler, original	13.333% plus said 2.666%, a total of	15.999%
Alfred Sadler	Same	15.999%
Clarence Sadler	Same	15.999%
Edgar L. Plummer	Same	15.999%

Louisa died intestate (R. p. 50) August 6, 1923 owning (presumably) her original 33.333% of the whole estate, plus said 2.666%, her $\frac{1}{5}$ share of the Bertha lapsed devise—making the Louisa total interest 35.999%

Divided among her heirs, the following interest holdings are produced, viz.:

To:

Edgar Sadler, the original	13.333%, plus 2.666% of the Bertha lapsed devise, plus $\frac{1}{4}$ or 8.999% of the Louisa 35.999% in- terest—a total of	24.998%
Alfred Sadler	Same	24.998%
Clarence Sadler	Same	24.998%
Edgar L. Plummer	Same	24.998%

Practically one-half ($12\frac{1}{2}\%$) of Plummer's 25% was by the operation of the judgment of the lower Court, taken from him and awarded to Edgar, Clarence and the Alfred Sadler estate. On the basis of plaintiff's case (R. p. 53) the property in controversy

is worth "in excess of \$100,000.00"; hence it would appear that \$12,000.00 belonging to Plummer had been given—\$4000.00 each to the three other interests.

"When any estate shall be devised to any child or other relation of the testator, and the devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate so given by the will, in the same manner as the devisee would have done if he would have survived the testator."

N. C. L., Sec. 9922.

That Edgar L. Plummer was an indispensable party to the action seems certain from a mere statement of the facts. We cite a few of the many authorities.

"* * * where a number of persons have undetermined interests in the same property, or in a particular trust fund, and one of them seeks, in an action, to recover the whole, to fix his share, or to recover a portion claimed by him, * * * other persons with similar interests are indispensable parties. The reason is that a judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or interest which remains available to the others. Hence, any judgment in the action would inevitably affect their rights."

Brown v. Christman (C.C.A. D.C.), 126 F. (2d) 625, 632—approving and quoting per supra from *Bank of Cal. Nat'l Assn. v. Super. Ct.* (Cal.), 106 P. (2d) 879, 883.

As a test in determining what is an indispensable party it was said:

“After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between parties before it? (3) Will the decree if made, in the absence of such party, have no injurious effect on the interests of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?”

The Court added that if any one of the four questions is answered in the negative, then the absent party is indispensable.

State of Washington v. United States (C.C.A. 9th), 87 F. (2d) 421-428.

See also the following:

Shields v. Barrow, 17 How., 130, 15 L. Ed. 158, 161;

Cons. Water Co. v. City of San Diego (C.C.A. 9th), 93 F. 849, 852;

Franz v. Buder (C.C.A. 8th), 11 F. (2d) 854, 856-857;

Baird v. Peoples Bank & Tr. Co. (C.C.A. 3rd), 120 F. (2d) 1001, 1003.

THE TRIAL COURT ERRED IN ASSUMING JURISDICTION AND DENYING DEFENDANT'S MOTIONS FOR DISMISSAL OF ACTION FOR FAILURE OF COMPLAINT TO STATE A CLAIM AGAINST DEFENDANT UPON WHICH RELIEF COULD BE GRANTED, THERE BEING AN ABSENCE OF LEGAL REPRESENTATIVE OF THE ESTATE OF LOUISA SADLER, SURVIVING WIFE AND AN HEIR OF REINHOLD SADLER, DECEASED, AND ALSO ABSENCE OF EDGAR L. PLUMMER, GRANDSON OF SAID DECEASED,—BOTH INDISPENSABLE PARTIES.

(Points 1, 2, 3, R. pp. 106-107; also Point 12, R. p. 112.)

SPECIFICATION OF ERROR NO. II.

The point supra was thrice urged upon the trial Court and thrice rejected. See:

Notice of motion, insufficiency of facts, filed October 16, 1944 (R. p. 42); decision on, denying January 17, 1945 (R. p. 47).

Notice of motion, absence of indispensable parties, filed December 19, 1945 (R. p. 57); decision on, denying October 17, 1945 (R. p. 61).

Notice of motion for dismissal, filed August 2, 1946 (R. p. 77); order denying (R. p. 80).

It affirmatively appears from the complaint that plaintiff Clarence T. Sadler is only one of five or six heirs of Reinhold Sadler in same proportions as stated in the will of Reinhold Sadler. The will, Exhibit A (R. p. 8) grants entire estate to the heirs, to wit:

- Louisa Sadler, surviving wife
- Edgar A. Sadler, son (defendant herein)
- Alfred R. Sadler, son
- Bertha Sadler, daughter
- Clarence T. Sadler, son (plaintiff herein)
- Edgar L. Plummer, son of Wilhelmina, a deceased daughter of Reinhold Sadler).

Reinhold Sadler's will was probated in the District Court at Carson City and his surviving wife Louisa was appointed and qualified as executrix. (R. p. 49.) Louisa died intestate (Amended Complaint, R. p. 50) on August 6, 1923. Bertha died intestate (Amended Complaint, R. p. 49) April 29, 1921. Each at time of death owned a substantial interest in the Reinhold Sadler Estate together amounting in value to about \$40,000.00 according to the amended complaint. (R. p. 53.)

It is this defendant's contention that the Court may not jurisdictionally proceed on the complaint of Clarence T. Sadler alone; that the interests of the several beneficiaries are joint, and that the legal representatives of Louisa Sadler, deceased, and Bertha Sadler, deceased, are indispensable parties—in support of which we cite:

“Ordinarily all parties whose interests are involved in the issue, and who must necessarily be affected by the decree, are necessary parties to a suit for an accounting.”

65 *C. J.*, 899, Sec. 795 and N. 10.

If absent party's interest is joint with that of either plaintiff or defendant, the absent party is an “indispensable party” and must be joined as either a party defendant or party plaintiff.

Samuel Goldwyn, Inc. v. United Artists (C. C., Del.), 113 F. (2d) 703, 707;

State of Washington v. U. S. (C.C.A. 9th), 87 F. (2d) 421, 427, 428;

Miller v. Mangus (C.C.A. 10th), 125 F. (2d) 507, 511;

Keegan v. Humble Oil & Ref. Co. (C.C.A. 5th),
155 F. (2d) 971 (important case);
Chidester v. City of Newark (C.C.A. 3rd), 162
F. (2d) 598.

The case *infra* is a leading case, and referring to “indispensable parties” as being those left out, where the leaving of them out would leave the controversy in such a condition that its final determination will be wholly inconsistent with equity and good conscience, Mr. Justice Curtis said:

“The bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties * * *.”

Shields v. Barrow, 17 How. 130, 15 L. ed. 158,
quoted per *supra* in:

Simon v. Shaffer (D.C. Okla.), 11 F. Supp.
450, 452.

The case *infra*, we believe, is closely in point. Action was for accounting and from order dismissing, appeal was taken. One J. F. Joyce had been made a trustee of a large trust property. He, with some five or six brothers and sisters were beneficiaries of

said trust. Two of the sisters, Mattie and Docia, brought the action, making the trustee brother and other brothers and sisters defendants, except *that one sister Mary was not made a party*. One of the beneficiaries had died before the suit was filed, but the complaint (as in the instant case as to Louisa Sadler and Bertha Sadler) contained no allegations in respect to the status of any probate proceedings, whether pending or closed. The Court said:

“It is fair to assume that they have been closed. If so, and Mattie and Docia were entitled to maintain the action as heirs at law of their deceased uncle, all other heirs having like or other non-severable interests were indispensable parties. Their sister Mary had such an interest, was an indispensable party, and was not joined; and so far as appears from the complaint, there may have been other nieces, nephews, or other kinsmen of the deceased, who had nonseverable interests, were indispensable parties and were not joined. That was enough to call for dismissal of the action. * * * Accordingly, if Mattie and Docia were entitled to sue as heirs at law of their father, their sister Mary was an indispensable party, and her absence required dismissal.”

Crutcher v. Joyce (C.C.A. 10th), 134 F. (2d) 809, 817.

In the case *infra*, a case we believe to be also closely in point, plaintiff sought a decree adjudging that defendants and each of them were trustees for plaintiff of an undivided one-third interest in the estate of her father, it was held that notwithstanding plaintiff sought relief only as to herself, the granting

of the relief demanded would necessarily disturb the rights and interests of the owners of the remaining interests and that therefore such persons were indispensable parties. And it further appearing that citizenship of some of said parties was the same as plaintiff, so that if they were added, the jurisdiction of the Court would be defeated,—held the suit should be dismissed.

O'Brien v. Markham (D.C. Cal.), 17 F. Supp. 633, 636.

See also:

Stevens v. Smith (C.C.A. 6th), 126 F. 706.

In the case *infra*, where suit was brought by only two of a larger number of the beneficiaries, who sought to have the interests of themselves and of the other heirs established as against the defendant (which is the fact in the instant case), the Court observed that what plaintiffs sought to have adjudged was the alleged interests not only of the two plaintiffs but also of all the heirs, and consequently held that all of the heirs were indispensable parties and that those omitted could not be brought into the suit without ousting the Court's jurisdiction, and the suit was accordingly dismissed.

Kendrick v. Kendrick (C.C.A. 5th), 16 F. (2d) 744, 745. Cert. denied: 71 L. ed., 877.

Plaintiff's case is for establishment of the alleged trust agreement; for an accounting covering a period of about 26 years' operations, and (Complaint, R. p. 7) for a decree requiring the alleged trustee to convey the corpus of the alleged trust property to plaintiff

and the other parties entitled. The other parties are indispensable. See:

Chicago etc. Co. v. Adams County (C.C.A. 9th), 79 F. (2d) 816, 818-819;

Bland v. Fleeman (D.C. Ark.), 29 F. 669, 671-672;

Cons. Water Co. v. San Diego (C.C.A. 9th), 93 F. 849, 851-852.

One Hedges, a real estate broker in Washington, D. C., had collected rents for various property owners. He died February 9, 1938 owing about \$21,000.00 trust funds. Two claimants out of a larger number sued to establish a lien on a certain fund and to have such fund distributed pro rata to them. On appeal reversing the trial Court, the Circuit Court of Appeals for the District of Columbia said:

“We note, also, the unexplained absence, as parties to this litigation, of other property owners who are entitled, presumably, equally with appellants, to participate in any proper distribution of the disputed fund. If they are indispensable parties, it would be of no sufficient answer that a decree entered in a case in which they were not parties, would not be *res adjudicata* as to them. The facts which would be presented by these additional property owners might vary from the facts entered here. A disposition of the funds, made without giving them opportunity to establish their claims, might be seriously prejudicial to their interests. If they are indispensable parties it is our duty to protect their interests on this appeal, even though the question was not raised in the district court; and it

will be the duty of the district court to protect them in any further proceedings there * * *."

Brown v. Christman (C.C.A. D. C.), 126 F. (2d) 625-631-632.

As a test in determining what is an indispensable party it was said by this Court:

"After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree if made, in the absence of such party, have no injurious effect on the interests of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?"

The Court added that if any one of the four questions is answered in the negative, then the absent party is indispensable.

As applied here, the first question would be answered in the negative, i.e., the interests of the absent parties are not distinct and severable, but are joint with the party before the Court. Also as to the second question, the Court cannot render justice between the parties before it because it is not "justice" to split up the cause of action and compel the defendant to submit to as many different trials as there are claimants, when the matter is essentially but one cause of action. So with the third. The Court cannot render a decree here without having injurious

effect on the interest of the absent party because the decree might have the effect of reducing his interest, and terminating the trust. Obviously, the trust is one single entity and if it is determinative as to one, it is terminable as to all. For aught that appears, the other beneficiaries may prefer to have the trust continue.

State of Washington v. U. S. (C.C.A. 9th), 87 F. (2d) 421, 427.

The case *infra* involved a testamentary trust. The plaintiffs alleged that the defendant trustees made unauthorized, unlawful and improper investment of the trust funds resulting in large losses and seek an accounting and judgment thereon. The defendants, the trustees, moved to dismiss the complaint, among other reasons, upon the ground of non-joinder of indispensable parties. Certain persons in being who would take remainders under the will were listed, and these persons had not been served, and the Court held that the suit must be dismissed for want of indispensable parties to the suit. The Court held that the interests of the parties were not distinct and severable; that the interests of all the parties resided in the corpus of the estate; the interests of the absent defendants could not be ascertained at this time, and they are therefore definitely not severable.

Baird et al. v. Peoples Bank (D.C. N.J.), 31 F. Supp. 622, 624.

“Speaking of the power of a court to adjudicate the controversy between the parties before the court in the absence of indispensable parties, the court in *Varney v. City of Baltimore*, 73 U. S.

280, 285; 6 Wall., 280, 285; 18 L. ed., 825, said: 'If a decree is made, which is intended to bind them, it is manifestly unjust to do this when they are not parties to the suit, and have no opportunity to be heard. But as the decree cannot bind them, the court cannot for that very reason afford the relief asked, to the other parties.' This was a partition suit, and jurisdiction was denied because some of the tenants in common were not before the court."

Buss v. Prudential Ins. Co. (C.C.A. 8th), 126 F. (2d) 960, 967.

The case *infra* was one to declare a trust and upon it being filed the Court issued an injunctive and custodianship order, and the trial Court rendered its orders over the objection that there were other parties, alleged beneficiaries of the trust, and that they were indispensable, etc. On appeal, there was a reversal on the ground the trial Court had no jurisdiction in the absence of the indispensable parties to interfere by injunctive order, etc., with the whole of the property, because such decrees were bound to affect the interests of the absent parties. That the plaintiff's suit being one requiring the alleged trustee to turn over to plaintiffs part of the property in which they were interested, the Court should not have proceeded on the merits to grant full relief as to the property in which the absent parties were also interested.

Edenborn v. Witton (C.C.A. 5th), 74 F. (2d) 374, 376.

We regard the case *infra* as being closely in point. In 1925 Mrs. Simon contracted with defendant as

attorney to recover certain land for her and to secure payment of his fees she executed a deed to an interest in the land. Pending the litigation Mrs. Simon died, leaving as her heirs the plaintiff and two others. Plaintiff Robert Simon alone brought suit alleging that he was one of the heirs; that defendant in the execution of the trust under his employment by the deceased Mrs. Simon, had received moneys for which no accounting had been made to the deceased or to her heirs and plaintiff sought cancellation of the contract and the deed and the recovery of his proportionate part of the moneys to be due on the accounting. The defendant moved for a dismissal of the bill for lack of indispensable parties and this was sustained by the Court. The motion for dismissal also included the ground that the plaintiff had no legal capacity to sue, i.e., the administrator should have brought the suit and this was likewise sustained.

Simon v. Shaffer (D.C. Okla.), 11 F. Supp., 450, 452.

In the case *supra*, the sought for decree of rescission which is entirely comparable to the sought for decree in the instant case of termination of the trust, an accounting, etc., and what was there said about leaving the contract of trust, etc. in full force as respects the absent parties while it was set aside as to the party before the Court, is equally applicable to the instant case.

“Notwithstanding the reason for the trust has ceased and its purpose has been fulfilled, equity will not decree its termination where some of the

trust beneficiaries do not or cannot consent to its termination. So long as it remains uncertain who are the parties in interest, the trust cannot be terminated * * *”

65 C. J., 356, Sec. 131 & N. 91-93.

The non-joinder of an indispensable party is fatal error, and the Court cannot proceed to a decree in the absence of such indispensable party, notwithstanding the fact that the joinder would oust the Court of jurisdiction.

State of Washington v. U. S. (C.C.A. 9th), 87 F. (2d) 421, 428.

In the case *infra* stockholders in a corporation formed a pool for their mutual protection in accordance with which they deposited their stock with trustees, and in a suit to have the pool terminated and void, the Court held that the parties depositing the stock in said pool were necessary parties and that the suit could not proceed without the presence of the persons in the pool as such.

Ryan v. Seaboard etc. Co. (C.C. Va.), 89 F. 397.

“The test of indispensability is not whether the decree is bound to injuriously affect the rights of the absent party; it is enough that such absence may ‘leave the controversy in such a situation that the final determination may be inconsistent with equity and good conscience.’”

Davis v. Henry (C.C.A. 6th) 266 F., 261, 266.

To the same effect, see:

Rogers v. Penobscott Co. (C.C.A. 8th), 154 F. 606, 616;

Commercial etc. Ins. Co. v. Lawhead (C.C.A. 4th), 62 F. (2d) 928, 932.

In the case *infra* it was held that a corporation was an "indispensable party" to a shareholders' suit against directors for losses caused by their misconduct, since decree could not protect directors against further suits by corporation unless corporation was party to the suit.

Philipbar v. Derby (C.C.A. 2nd), 85 F. (2d) 27, 30.

But precisely, on principle, that is the case here, where one of the beneficiaries commences action, but admittedly any decree rendered herein could not protect the defendant Edgar Sadler against such further suit by the other beneficiaries, except by they being made parties to the suit now.

In the case *infra* the Court cited with approval:

"In general, in such a case (suits affecting residuary legatees or distributees) all the other residuary legatees or distributees ought to be made parties, so that the rights and claims may all be conveniently established at the same time, and in the same suit, * * * In suits affecting the rights of residuary legatees or of next of kin, the general rule is that all the members of the class must be made parties."

Stevens v. Smith (C.C.A. 6th), 126 F. 706, 711.

“In suits affecting the rights of residuary legatees or next of kin, the general rule is that all the members of the class must be made parties.”

McArthur v. Scott, 113 U. S. 340, 28 L. ed. 1015, 1032.

The case *infra* was a suit against the defendant to have an accounting as trustee under a power of attorney which is set out in the opinion. The beneficiary died and his widow having died intestate, under the law of descent and distribution in the State of Mississippi, was entitled to take his entire estate after payment of his debts. As such distributee she brought the suit, but on objection being made there was no administration on the estate of the deceased husband and no allegation that the deceased husband left no heirs at law, the bill of the widow for the accounting was dismissed, the Court ruling that the suit could not be maintained for want of proper parties.

Newman v. Schwerin (C.C.A. 6th), 61 F. 865
(Per Lurton, J.).

To the effect that the interests of the absent heirs of Reinhold Sadler are non-severable and that they are “indispensable” parties, see the following, where life tenants sued, and complained of trustee’s administration of the corpus of the trust, and it was held that remaindermen were “indispensable” parties since their interest in the corpus and in the instru-

ment was just as direct as that of the life tenants and there was a distinct and non-severable interest.

Baird v. Peoples Bank (C.C.A. 3rd), 120 F. (2d) 1001, 1003.

Fact that joinder of indispensable parties will oust jurisdiction, does not authorize the Court to proceed in their absence. The plaintiff is not deprived of a remedy but is merely relegated to the state Court.

Talbutt v. Security Tr. Co. (D.C. Ky.), 22 F. Supp., 241-242.

Fact that absent parties would not be bound or concluded by the decree does not affect conclusions that they be brought in when they are "indispensable" parties.

Talbutt v. Security Tr. Co., supra.

To allow one of several parties equally interested in a cause of action, to bring a separate action, leaving the other party or parties to subsequently bring one or more additional actions is nothing more nor less than a splitting of the cause of action. The object of the rule against splitting is to prevent repeated litigation; to protect defendant from unnecessary vexation and to avoid the costs and expense incident to numerous suits.

1 *C. J.*, 1107, Sec. 277.

Obviously, if plaintiff were the only heir of Reinhold Sadler and claimant as beneficiary, he could not divide up his interest or bring separate suits, and we are unable to perceive why, in case there are two

or more plaintiffs, a different rule should apply and a defendant be compelled to submit to a number of suits for essentially the same subject matter.

The rule against the splitting of causes of action is mainly for the protection of the defendant.

1 *C. J. S.*, 1308, Sec. 102 & N. 99 citing: Federal as well as State cases.

A defendant is entitled to protection against the cause of action being split up into as many parts as there happen to be alleged beneficiaries. *Nemo debet bis vexari*.

Halpin v. Savannah River etc. Co. (C.C.A. 4th), 41 F. (2d) 329, 333.

Inasmuch as the rule as to "indispensable parties" appears to be the same in state courts, we herewith present some adjudications on the point.

The case *infra* involved a situation quite similar to the case at bar. Defendant, Title Insurance & Trust Co., made a declaration of trust on March 25, 1931, acknowledging delivery to it of real and personal property to be held for the use of named beneficiaries. On March 7, 1936 one of the named beneficiaries, who was also settlor, commenced suit alleging fraud, etc. and prayed that the trust be cancelled and that the title to the real and personal property be quieted in him. The trustee, Title Ins. & Trust Co. raised the point that the Court was without jurisdiction to revise or in any manner modify the trust because the other beneficiaries were not before the Court. The Court said:

“When the litigation is between them, all beneficiaries of a trust are indispensable parties; without their presence the trial court has no jurisdiction to proceed (citing cases). The latest expression of the rule is by Mr. Chief Justice Gibson in the case of *First National etc. Bank v. Superior Court* * * * ‘The law is settled in this state that where one of several beneficiaries seeks to fix his share in a trust fund and where judgment in his favor would inevitably determine the amount available for others similarly situated, such other beneficiaries are indispensable parties. A judgment rendered in their absence purporting to determine their rights is in excess of the court’s jurisdiction (citing cases).’”

Mabry v. Scott (Cal.), 124 P. (2d) 659, 662-663.

Statutes such as Sec. 389, C.C.P. Cal., providing that the Court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, etc. but when a complete determination cannot be had without the presence of other parties the Court must order them brought in, is declaratory of the equity rule of practice.

Bank of Calif. v. Supr. Ct. (Cal.), 106 P. 879, 882-883.

So, in an action by one creditor against assignees for the benefit of creditors, seeking an accounting and payment of his share of the assets, the other creditors held indispensable.

McPherson v. Parker, 30 Cal. 455, 457, 89 A. D. 129.

“It is certainly the general rule, as appellant contends, that in an action in equity against the trustee for an accounting the beneficiaries of the trust are necessary parties; and, where the absence of any of them is shown by the trustee, the court will order them brought in, and will refuse to proceed until they are before it, or, should it so proceed despite the legal protest of the trustee, the decree will be reversed upon appeal * * * It (the rule) is designed for the protection of the trustee himself, in order that he may not be subject to harassment by further litigation at the instance of the omitted beneficiaries, who would not be bound by the former judgment.”

Alison v. Goldtree (Cal.), 49 P. 571, 572.

“When the trial court finds, or the record indisputably shows, that a complete determination of controversy cannot be had without presence of other parties, such parties become ‘necessary parties’ and ‘indispensable parties’, and the section (statute respecting when trial court shall order other parties to be brought in) is mandatory, and the question then becomes one of jurisdiction in that the court may not proceed without bringing them in.”

Bayle-Lacoste & Co. v. Supr. Ct. (Cal.), 116 P. (2d) 458, 464-465.

On August 16, 1929, Edith W. Crose executed a declaration of trust covering certain real and personal property, and naming the First National Trust & Savings Bank of San Diego a trustee, to collect the income and pay same to one Juliet Guthrie Wilson during her lifetime, and upon her death, to her

surviving issue. The trustee refusing to recognize her, Sally Neil Wilson, one of the claimed beneficiaries, commenced action to establish herself as a beneficiary and for an accounting. The trustee answered. On the trial the trustee objected to introduction of evidence on ground the Court did not have jurisdiction to render judgment therein without the presence of four named persons and who were designated beneficiaries. The trial Court overruled the objection and rendered an interlocutory judgment, decreeing that one of the named beneficiaries was entitled to one-half of the income from the trust and ordered the trustee to account.

The trustee contended that the absent beneficiaries were "indispensable parties"; that without their presence trial Court had no jurisdiction to proceed. The California Supreme Court said:

"It may be assumed that under the law the beneficiaries of a trust are indispensable parties to an action involving conflicting rights between themselves or between them and the trustees. (Citing cases.)"

First Natl. Tr. & Sav. Bk. v. Supr. Ct. (Cal.),
121 P. (2d) 729, 731.

A testator left his property to trustees, naming sons and grandchildren as beneficiaries. One of the beneficiaries brought action to construe the trust. Defendants, trustees, objected that the other beneficiaries were not brought in. The trial Court overruled the objection though it tried to decide case before it without prejudice to the absent parties. The

trustees appealed, contending they were not protected against the persons interested in the trust but who had not been brought in before the Court. In reversing the trial Court, the Appellate Court said:

“The action involves the rights of the beneficiaries, not only as between themselves, but also as between them and the trustees. This being so, the latter are entitled to protection against further litigation, and to have the rights of all interested in this portion of the trust estate finally determined.”

Smith v. Bank of California (Cal.), 65 P. (2d) 1361, 1363.

So, in a case where one of two settlors to a trust, under which there were four beneficiaries named, brought suit against trustee alleging invalidity of trust, and point was made as to absence of the beneficiaries, the trial Court nevertheless proceeded with the case to judgment. The Appellate Court in reversing, said the principle that in such cases the beneficiary must be brought before the Court, had been squarely decided in previous cases and the doctrine confirmed by later cases and added:

“No lack of interpleading, omission or negligence of the trustee will excuse this omission.”

Hutchens v. Security Tr. & Sav. Bk. (Cal.), 281 P. 1026, 1028.

In the case *infra* a debtor executed a deed of trust to secure debts to two persons. The trustees brought a suit to have the Court declare the interests of the respective parties under the deed of trust and to

foreclose same. But one of the persons for whose benefit the trust was created was not made a party thereto, and the point was made that a court of equity could not properly dispose of the case until the said party was before it, and that the trustee could not properly represent such absent creditor or beneficiary. A decision of the trial Court to the contrary was reversed on appeal.

Mitau v. Roddan (Cal.), 84 P. 145, 147, 6 L.R.A., N.S., 275.

Where plaintiffs and ten others, owners of property, conveyed same to a trustee to carry out their written contract with defendant, and plaintiff subsequently brought an action against the trustee for cancellation, etc., but did not bring before the Court the other parties interested in the trust. It was held that the trial Court committed error in proceeding without the absent parties; that the trustee was not authorized under the statutory provision which provides that the trustee of an express trust may sue without joining beneficiaries, etc., same being applicable only to the case of strangers, and on appeal the Supreme Court reversed the action above of the trial Court.

Lake v. Dowd (Cal.), 270 P. 212, 213.

One Franz died February 7, 1898, leaving his property to his wife for life, remainder over to his ten children in equal shares. Thereafter the wife by trust agreement conveyed certain stocks, bonds, etc. to two persons as trustees. Thereafter E. D. Franz, a son and a beneficiary, brought action alleging the trustees

had received information as to the trust property and had refused to account and that trustees wrongfully denied plaintiff had any interest. The other beneficiaries of the trust were not brought before the Court. The trial Court dismissed the case for want of indispensable parties. On appeal, the Court referred to the prayed for accounting and that it would be necessary to determine whether or not the plaintiff still owned an interest, and said:

“We fail to see how any possible decree could be framed granting any part of the relief prayed for without a determination of those issues. It follows that Sophie Franz, who is the owner of the life estate, and the living children and heirs of deceased children, who are the alleged owners of nine-tenths of the remainder estate, are indispensable parties, because they have such an interest in the subject matter of this controversy that, without directly affecting their interests, a final decree could not be rendered between the present parties to the suit.”

Franz v. Buder (C.C.A. 8th), 11 F. (2d) 854, 857.

And in discussing the general subject, the United States Supreme Court, in the case *infra*, said:

“And there is a third class, whose interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed.”

Barney v. Baltimore City, 6 Wall. 280, 18 L. Ed. 825.

“Ordinarily where the rights involved in litigation arise upon contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it (citing cases). Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present.”

National Licorice Co. v. National Labor Rel. Board, 309 U. S. 350, 84 L. Ed. 799, 810.

“In a suit for an accounting the general equity rule in regard to parties applies, namely, that all persons interested in the subject matter—that is, in the accounting—should be before the court, to the end that complete justice may be administered.”

1 *C. J.*, 631, Sec. 93 and No. 50, citing long list of U. S. Supreme Court and other federal and state Court cases.

“Where several persons have a united or concurrent interest in having an accounting taken, or in its result, one of them cannot maintain a suit for an accounting without joining the others;
* * *”

1 *C. J. S.*, 665, Sec. 37 and N. 62.

“The reason of the rule is that otherwise the accounting party may be harassed with successive suits for the same purpose by each party.”

1 *C. J.*, 631, Note.

“Under Rule 19 (a) persons having a joint interest must be made parties, either as plaintiffs or

defendants. The phrase 'joint interest' must be construed to mean those who were indispensable parties under the previous practice before the adoption of the new Federal Rules of Civil Procedure."

2 *Moore's Federal Practice*, 2142;

Simpkins, Federal Practice, 330 et seq.

THE TRIAL COURT ERRED IN HOLDING IT COULD TAKE POSSESSION OF PROPERTY NOW AND FOR MANY YEARS PAST IN THE POSSESSION OF THE STATE DISTRICT COURT OF NEVADA IN AND FOR ORMSBY COUNTY.

(Point 4, R. p. 107.)

SPECIFICATION OF ERROR NO. III.

The complaint shows that the property involved is the property, or proceeds of property, belonging to Reinhold Sadler at the time of his death. It clearly counts on an equity in the property continuing and inhering in the Estate of Reinhold Sadler, deceased, or the beneficiaries under his will. But there is no allegation that said property was ever distributed to the alleged heirs and legatees named in the will; no allegation that the administration of the Reinhold Sadler estate has ever been closed. The mere fact that the complaint alleges Louisa Sadler, the executrix, has died, is immaterial on this point because the possession of estate property is of and by the Court, and such possession is continued until termination as by law provided. *Therefore, the property is still in custodia legis of the State Court at Carson City.* Plaintiff is in the position of asking this Court to

draw unto itself the property and take same out of the custody of the State Court. No authority we know of authorizes any such procedure. Per contra, the authorities are all against it.

“The courts of the United States * * * cannot seize and control the property which is in the possession of the state court * * * It is also true, * * * that the prior possession of the state probate court cannot be interfered with by the decree of the federal court.”

Waterman v. Canal-Louisiana Bk. & T. Co.,
212 U. S. 33, 54 L. Ed. 80, 84, 85.

See also:

Puder v. Agler (D.C. Ohio), 242 F. 95, 98.

In any event, the legal representative of the Reinhold Sadler estate, the Louisa Sadler estate, and the Bertha Sadler estate would seem to be indispensable parties to this action. Such in fact was the ruling in the case *infra*, which was a suit for an accounting for property alleged to have been withheld from an estate and the Court said the legal representative of the estate was an indispensable party.

Ryan v. Kelsey (C.C.A. 3rd), 259 F. 945,
7 A.L.R. 234.

“An administrator appointed by a state court is an officer of that court; his possession of the decedent’s property is a possession taken in obedience to the orders of that court; it is the possession of the court and it is a possession which cannot be disturbed by any other court.”

Byers v. McAuley, 149 U. S. 608, 37 L. Ed. 867-871.

The identical question was raised and decided by Judge Hawley in the famous litigation involving the Estate of M. D. Foley, deceased. See:

Smith v. Foley (C. C. Nev.), 80 F. 949;

In re Foley (C. C. Nev.), 76 F. 390.

See also, for case on similar facts to case at bar, when Federal Court was held to be without jurisdiction:

Moore v. Fidelity Tr. Co. (C. C. Pa.), 134 F. 489, 493.

We say further that in any event the legal representative of the estate of Reinhold Sadler, deceased, should be brought in as a party. By the device of asking this Court to compel defendant, alleged trustee in possession of the estate property, to account, and to convey said property to the parties entitled, plaintiff is in effect asking that this Court "distribute" the property of such estate. We say further such proceeding is exclusively for the State Probate Court.

TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS BASED UPON PLAINTIFF'S AMENDED COMPLAINT AFFIRMATIVELY SHOWING THAT HE HAD NO CAUSE OF ACTION IN THAT THE DECREE OF MARCH 2, 1918 ANNEXED TO HIS COMPLAINT DECREED PLAINTIFF HAD NO INTEREST OR EQUITY IN THE DIAMOND VALLEY RANCH AND PLAINTIFF'S ACTION THEREFORE IS MERELY AN ATTEMPT BY INTRINSIC MATTER TO IMPEACH AND NULLIFY SAID DECREE.

(Points 4, 5, 6, R. pp. 107-108.)

SPECIFICATION OF ERROR NO. IV.

Admittedly, said decree, Paragraph III (R. p. 31), adjudged and decreed that defendants Edgar and Alfred Sadler were the true and lawful owners of the land (Diamond Valley Ranch) and that their title is adjudged to be quieted against all claims and demands, as against all persons claiming or to claim said premises or any part thereof, through or under Huntington & Diamond Valley Stock & Land Company, the plaintiff.

Clarence Sadler was a party to said action. Said decree was pursuant to the stipulation, Exhibit C also annexed to the complaint (R. p. 18), in which plaintiff by his attorney-in-fact, Alfred Sadler, stipulated that Edgar Sadler and Alfred Sadler were the owners of the Diamond Valley Ranch; that neither he nor any of the other parties had any right, title or estate in said property or any part thereof; that his counter-claim might be dismissed and that the money to be paid by Edgar Sadler and Alfred Sadler to the plaintiff as the consideration for the settlement and decree, should be solely the obligation of Edgar Sadler and Alfred

Sadler, and that none of the other parties hereto (including himself) shall be in anywise personally liable therefor.

“A judgment is the final determination of the rights of the parties in the action or proceeding.”

N. C. L., Sec. 8794.

A judgment as a plea, is a bar or as evidence, is conclusive not only of the rights which it establishes, but of the facts which it directly decides.

McLeod v. Lee, 17 Nev. 103, 28 P. 124.

“Sec. 6. Any judgment or order in a civil action or proceeding, except when expressly made final by this act, may be reviewed as prescribed by this act, and not otherwise.”

N. C. L., Sec. 8881, as amended, Stats. 1937, p. 55.

There are three methods of reversing, vacating or modifying a judgment, viz.:

By new trial

By appeal

By a suit in equity for extrinsic fraud in the obtainment of the judgment.

No fraud, either extrinsic or intrinsic is pleaded in this case, nor in any way relied upon. Per contra, the stipulation and the decree of March 2, 1918 are pleaded by plaintiff as part of his cause of action as they are annexed to his complaint and made a part thereof.

In respect to action to quiet title, the law is:

“In this form of action all matters affecting the title of the parties to the action may be litigated and determined, and the judgment is final and conclusive, and cuts off all claims or defenses of the losing party going to show title in himself, of whatever source derived, and which existed at the time of the suit, whether pleaded therein or not.”

34 *C. J.*, 959, Sec. 1363 and N. 27, 28.

Plaintiff's action herein, claiming a title or interest in the Diamond Valley Ranch, inhering in him prior to March 2, 1918 and continuing thereafter, is not only ignoring the solemn decree of the Court rendering the judgment on March 2, 1918, pleaded in plaintiff's complaint, but it is flouting and in absolute defiance of that decree.

If (though it is absolutely denied by us) the plaintiff had any title or interest in the Diamond Valley Ranch prior to March 2, 1918, then the decree of March 2, 1918 operated to cut that off as completely and as effectually as if the plaintiff had executed a deed to such interest to Alfred and Edgar Sadler, because the statute provides that a decree of a Court may of itself constitute a transfer of title or interest and be vested in a party found entitled thereto.

N. C. L., Sec. 8797.

It is only as to title acquired after the decree quieting title has been entered that a party may rely upon.

Smith v. Kessler (Ida.), 127 P. 172, 173;

Vore v. Ephraim (Cal.), 159 P. 719, 721.

“Where the title is properly in issue and a judgment is duly made, an adjudication in favor of either party as to such title will necessarily constitute a bar to any action or proceeding as to any title claimed at the time of the commencement of such action by either party or anyone claiming under the same title. Under this principle a claim of one as heir at law to real estate is cut off by a judgment against him in an action to quiet title, in which the title is put in issue and he might have presented such claim but did not;
* * *,”

5 *R. C. L.*, 679, Sec. 54 and N. 6.

“The judgment or decree in an action to quiet title bars subsequent litigation between the parties or their privies on the same cause of action and is conclusive, not only as to all issues actually involved and determined, but also as to such matters as might have been litigated.”

51 *C. J.*, 283, Sec. 280 and N. 54.

Action was to foreclose a trust deed. Two parties were made defendants under the general allegation that they claimed some interest in the property subject to the trust deed. Both these parties answered. The co-defendants made no issue between themselves by serving a cross-complaint or the like, but as issues were actually tried between the parties, the Court held that as the defendants at the trial actually litigated the issues which the decree in the case purports to determine, the decree was conclusive as between them. And that where the issues between the parties had

once been tried and finally determined, the same questions could not again be litigated by said parties or their privies.

Gulling v. Washoe County Bank, 29 Nev. 257, 89 P. 25.

The March 2, 1918 decree operated to absolutely and completely cut off and destroy any interest or claim of interest which the plaintiff Clarence Sadler had, could or might make to the Diamond Valley Ranch at the time such decree was entered. This, as we claim, would naturally include any interest referable to the so-called trust agreement, Exhibit L, assuming it had been signed by Edgar Sadler, if same were made prior to the making of the March 2, 1918 decree. The decree and Exhibit L (alleged trust agreement) are both dated the same day, but plaintiff's amendment to his amended complaint, Paragraph 6, alleges:

"Whereafter (i. e., after the making of the alleged trust document) and on or about March 2, 1918, a judgment and decree duly was entered in said action ordering that the said property be transferred to defendant Edgar A. Sadler and to Alfred R. Sadler, a copy of said decree is attached hereto as Ex. D."

"A judgment rendered by a state court of competent jurisdiction is binding and conclusive upon the parties when made the basis of a claim or defense in any court of the United States, and cannot be reviewed or be examined as to the merits of the original controversy."

34 C. J., 1158, Sec. 1640 and N. 43, citing long list of cases.

If plaintiff had brought this suit in the District Court at Eureka, Nevada and made same contention that he is making in this Court i. e., that despite the March 2, 1918 decree adjudging that he had no title in the Diamond Valley Ranch, he still contended in the District Court at Eureka that he did have an equity as an heir of Reinhold Sadler, deceased, and that this equity continued notwithstanding the March 2, 1918 decree, and he had pleaded the said decree as a part of his complaint, is it not absolutely certain that the judge presiding in the State District Court at Eureka County would hold that plaintiff had pleaded himself out of Court?

The fact that this suit is in the Federal Court and not in the District at Eureka County can make absolutely no difference, because:

“A judgment duly rendered by a state court of competent jurisdiction is entitled to receive in all courts of the United States the ‘full faith and credit’ which the courts of another state would be bound to accord to it; that is, it will be given the same credit, force, and effect which it would receive in the courts of the state where it was rendered, no more and no less.”

34 *C. J.*, 1157, Sec. 1639 and N. 33.

The decree in the quiet title suit entered March 2, 1918, in paragraph III thereof, adjudges that Edgar and Alfred are the true and lawful owners of the Diamond Valley Ranch and

“all persons claiming or to claim said premises or any part thereof; through or under said plaintiff (Huntington and Diamond Valley Stock and

Land Company) are hereby adjudged and decreed to be invalid and groundless, * * *”

Plaintiff's claims are based upon the alleged ownership by Reinhold Sadler, deceased of 4000 shares of stock in a company claimed to be the above, i. e., plaintiff's claims are through or under said company. But as above stated, the decree states that the same “are hereby adjudged and decreed to be invalid and groundless”.

THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS THAT PLAINTIFF'S CASE IS FATALY DEFICIENT IN THAT THERE ISN'T THE SLIGHTEST EVIDENCE OF ALLEGED ORAL TRUST AGREEMENT MADE PRIOR TO MARCH 2, 1918.

(Point 6, R. p. 108.)

SPECIFICATION OF ERROR NO. V.

Plaintiff's amended complaint alleges, Paragraph 6 (R. p. 51):

“Said stipulation (Ex. C. annexed to Complaint) was made and entered into by Louisa Sadler, Edgar A. Sadler, Alfred R. Sadler, Bertha L. Sadler and Clarence T. Sadler in consideration of an *agreement between them that said Edgar A. Sadler and Alfred R. Sadler would acquire and hold the legal title to said real property, and would take and hold title to and possession of the livestock, ranch equipment and other personal property situated thereon, in trust for the heirs of Reinhold Sadler, deceased as named in the terms and provisions of his said will. Thereafter a written memorandum of said trust agreement*

was executed by said Edgar A. Sadler and Alfred R. Sadler as hereafter alleged. Thereafter and on or about March 2, 1918 a judgment and decree duly was entered in said action ordering that the said property be transferred to defendant Edgar A. Sadler and to Alfred R. Sadler, a copy of said decree is attached hereto as Exhibit D.”

It would thus appear that whatever interest, equity, etc., plaintiff may otherwise have been able to claim under said Exhibit L, it was wholly cut off by the decree made subsequent to said Exhibit L, because that decree is all-sweeping that all claims of persons other than Edgar and Alfred Sadler to said property “are hereby adjudged and decreed to be invalid and groundless”. This is not only the language of the decree but it is also the language of the February 14, 1918 stipulation, Exhibit C, agreed to by plaintiff by his attorney-in-fact.

Further, if as plaintiff alleges, the alleged trust document was made before the decree, then the trust (assuming it to have been signed by Edgar Sadler and all necessary parties) would be ineffective because the rule is that the creator of the trust must hold the legal title to the subject matter at the time the alleged trust is claimed to have been established.

65 C. J., 268—note citing *Farmers etc. Co. v. Winthrop*, 202 N.Y.S. 456, modified, 144 N. E. 686.

THE TRIAL COURT ERRED IN NOT APPLYING THE RULE THAT BURDEN OF PROVING THE ALLEGED TRUST IS UPON PLAINTIFF AND THE PROOF OF ESSENTIALS OF THE ALLEGED TRUST MUST BE CLEAR, SATISFACTORY AND UNEQUIVOCAL.

(Points 5, 6, 7, R. pp. 107-109.)

SPECIFICATION OF ERROR NO. VI.

The alleged trust agreement of March 2, 1918 of itself does not purport to create any trust or power over or concerning lands. It does not purport to give Edgar Sadler and Alfred Sadler, or either of them, the right to occupy the real property. They have no greater power in regard to the real property, so far as the agreement of March 2, 1918 is concerned, than any of the other persons named therein, to-wit: Bertha Sadler, Louisa Sadler or Clarence Sadler. The only trust agreement set up in the plaintiff's amended complaint is an oral agreement or "stipulation" (see p. 4, lines 7 et seq., Amended Complaint) and is described as follows:

"* * * an agreement between them that the said Edgar A. Sadler and Alfred R. Sadler would acquire and hold the legal title to said property, and would take and hold title to and possession of the livestock, ranch equipment and other personal property situated thereon, in trust for the heirs of Reinhold Sadler, deceased, as named in the terms and provisions of his said will. Thereafter written memorandum of said trust agreement was executed by said Edgar A. Sadler and Alfred R. Sadler as hereinafter alleged."

The "hereinafter" written memorandum refers to Exhibit L which of itself does not purport to create

any trust over or concerning lands or any property whatsoever. Evidently it is sought to show a trust by first alleging an oral agreement in reference to it and then stating that some other document entirely different from the alleged oral agreement was "written memorandum of said trust agreement".

"No certain form of words is required in the creation of a trust, but the intention must be complete and plainly manifest, and not derived from loose and equivocal expressions of the parties, made at different times and upon different occasions. Any words which indicate with sufficient certainty a purpose to create a trust will be effective in so doing, without the use of the words 'trust' or 'trustees'." (syl.)

Estate of Smith (Pa.), 27 A.S.R. 641.

"The burden of proving the existence of a trust rests on the person asserting it, and he must prove it by clear and satisfactory evidence having in view all the surrounding facts and circumstances and the intention of the parties."

26 *R.C.L.*, 1203, Sec. 44 and N. 5.

"While it is true that no particular formality is required in the creation of the trust, nor need all the conditions of the trust be expressed in the single paper, nevertheless documents must clearly show, not only the existence of the trust, but also the extent to which the property is held in trust. As said by Mr. Pomeroy in his work on equity jurisprudence, Sec. 1009: 'The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject matter of prop-

erty embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail. Citing: *Wittfield v. Forster* (Cal.), 57 P. 219."

Root v. Kuhn (Cal.), 197 P. 150, 152.

"* * * to constitute an express trust there must be an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created, accompanied with an intention to create a trust, followed by an actual conveyance or transfer of lawful, definite property or estate or interest. * * *"

65 *C. J.*, 231, Sec. 21 and N. 68-74;

Idem. 265, Sec. 46-47 and N. 16;

Idem. 270, Sec. 50 and N. 43-44.

"Where it is claimed that a trust is to be implied from the transaction the acts must be such as will admit of no other interpretation than the creator retain no legal rights over the property, and the inference arising from the acts must be plain, that either the settlor constituted another trustee or else that he held the property himself as trustee. It would introduce a dangerous instability of titles if anything less was required, or if a voluntary trust inter vivos could be established, in the absence of express words, by circumstances capable of another construction, or consistent with a different intention."

26 *R.C.L.*, 1200, Sec. 36 and N. 18, 19.

“To establish express trust of land, writing must identify property with same certainty required in deed of conveyance, and must clearly show nature and objects of trust.”

Pacheco v. Mello (Wash.), 247 P. 927.

See, also:

65 *C. J.*, 282, Sec. 62 and N. 92-93;

Idem. 271, Sec. 51 and N. 50.

“Express trusts are generally created by an instrument pointing out directly and expressly the property, persons, and the purpose of the trust,
* * *

65 *C. J.* 264, Sec. 46 and N. 84.

“It has been held that no enforceable trust arises from a parol agreement between a trustee and the beneficial owner of land that the trustee shall sell the land, discharge liens, and hold the balance of the proceeds for the benefit of the owner’s children; an agreement that the grantee of land should hold the premises in trust for the benefit of a designated person, to collect the rents, pay the taxes and encumbrances, sell the land, and pay over the difference between the sums received and those paid by the grantee;
* * * an agreement to buy land at execution sale and resell it, and, after deducting purchase price and expenses, pay over the balance to the execution defendant; or an agreement that a grantee of land, under a deed containing no restrictions or erections, shall sell the land after the vendor’s death and divide the proceeds between designated persons. So it has been held that an agreement made at the time of executing a deed, that grantee shall hold the title in trust for the

grantor and, on sale of the land, pay the proceeds to him, is within the statute of frauds forbidding express trusts in land by parol."

65 *C. J.*, 257, Sec. 38 and N. 82-89.

If the legal title of land obtained by reason of a promise to hold it for another, and the latter, confiding in the purchaser, and relying on his promise, is prevented from taking such action in his own behalf as would have secured the benefit of the property to himself, and the promise is made at or before the legal title passes to the nominal purchaser, it would be against equity and good conscience for the latter, under the circumstances, to refuse to perform his solemn agreement. It is accordingly generally held that a trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise but because of the fact that by means of such promise the purchaser has induced the transfer of the property to himself. The mere non-performance of a beneficial parol agreement is not, however, such fraud or bad faith as will induce a court of equity to compel performance. There must be a salutary and proper limitation to the doctrine of parol trusts and there must be some element of fraud or of bad faith apart from a breach of the agreement itself, which makes it inequitable that the vendee should hold the legal title absolutely or discharged by any trust.

26 *R.C.L.* 1244, Sec. 90 and N. 3, 5.

A parol agreement entered into at the time of executing conveyance of real estate in good faith, that

grantee shall hold the property in trust for the grantor, and, when sold, pay the proceeds to him, is void, as an attempt to create an express trust, by parol, and the land and its proceeds when sold as the property of the grantee. (Syll.)

Marvel v. Marvel (Nebr.), 97 N. W. 640, 113 A.S.R. 792, 793.

“The nature of a trust is to be determined by the instrument evidencing the trust and by that alone.”

65 C. J., 510, Sec. 261 and N. 53.

“It is essential to the validity of a trust whether express or precatory, that the language employed definitely indicates an intention to create a trust, that the subject matter thereof be certain, and that the object of persons intended to have the benefit thereof be certain. The authorities are legion to this effect.”

In Re: Ralston's Estate (Cal.), 37 P. (2d) 76, 77.

So, in the case *infra* it was held to establish a trust (resulting) the evidence must be clear.

Frederick v. Haas, 5 Nev. 389, 394.

In the case *infra* the Court held that parol evidence to defeat a deed and establish a trust, must be clear, and attended with no uncertainty, and even then should be received with great caution.

Dalton v. Dalton, 14 Nev. 419, 427-428.

“Where an express trust is sought to be established by an instrument in writing, the intention

to create the trust must appear upon the face of the instrument''. (Syll.)

Skeen v. Marriott (Utah), 61 P. 296, 300.

The rule adopted and followed by courts of equity requires plaintiff who seeks to establish a trust in real property contrary to the express terms of the deed which vested title in another, to make out his case "clearly and satisfactorily beyond a reasonable doubt" is established law.

Morrow v. Matthew (Ida.), 79 P. 196, 199—
where Court refers to about 100 cases on the point.

"As we understand the statute above quoted, (statute of frauds) it was intended to prevent just such a class of proof and to preclude the possibility of titles becoming subject to the capricious memories of interested witnesses. * * * The statute was enacted to guard against the frailties of human memory and the temptations to litigants and their friendly witnesses to testify to facts and circumstances which never happened. Experience has convinced both juries and law makers that the only safe way to preserve and pass title to real property is by a written conveyance subscribed by the grantor. The beneficial effects of this statute would be destroyed if a grantor could come in years afterwards and submit oral testimony to show that the conveyance was not intended as an absolute grant but was only intended to create a trusteeship in the grantee".

Dunn v. Dunn (Ida.), 83 P. (2d) 471, 475-476.

While in the case *infra* a constructive trust was involved, it is believed the same rule would apply to an express trust where the latter was denied. The Nevada Supreme Court held that a constructive trust cannot be established by a mere preponderance of evidence, but must be established by clear, definite, unequivocal, and satisfactory evidence.

Moore v. DeBernardi, 47 Nev. 46, 220 P. 544, 545.

The rule that plaintiff in certain types of cases must prove his case by more than a mere preponderance, i. e., by evidence that is clear, cogent and convincing, etc., is especially applicable to cases where there has been a long delay, either bringing the case to trial or in commencing it, while witnesses have died and the memories of the living as to important facts have failed.

Kellogg etc. Co. v. Dean El. Co. (D.C. Ohio), 231 F. 194, 195.

In the case *infra* it was contended that a certain writing effected a trust, but the language was not clear. The Court said that while a court of equity may declare and enforce a trust it has no authority to create a trust, or to make a contract for the parties; that vague and indefinite expressions will not be held to create a trust; that proof of intention to establish a trust must be unequivocal; that a voluntary trust cannot be complete unless there is reasonable certainty as to the manner in which the trust fund is to be used or applied and the purposes of the trust must be plainly indicated.

Bliss v. Bliss (Ida.), 119 P. 451, 454.

“Clear and convincing evidence, or something beyond a mere preponderance of the evidence, is usually required in order to establish, by parol or extrinsic evidence, the invalidity of a written instrument, * * * Thus, parol or extrinsic evidence must be clear, positive and convincing in order to contradict or vary * * * the terms of a written contract, or of a deed, * * *”

32 *C.J.S.* 1060, Sec. 1923—citing long list of cases.

THE TRIAL COURT ERRED IN NOT APPLYING THE RULE THAT EVIDENCE TO DEFEAT A DEED AND ESTABLISH A TRUST MUST BE CLEAR, AND ATTENDED WITH NO UNCERTAINTY.

(Point 7, R. p. 108.)

SPECIFICATION OF ERROR NO. VII.

Evidence to defeat a deed and establish a trust must be clear, and attended with no uncertainty, and even then should be received with great caution as to parol evidence.

Dalton v. Dalton, 14 Nev. 419, 427.

See also:

Frederick v. Haas, 5 Nev. 389.

In the case *infra*, the Court held that a person claiming an interest in property, who yet has allowed another to take the title in his own name and to treat it as his own for years, must make out a strong and satisfactory case. Also, that an agreement between two persons by which one, without furnishing any means or doing anything to further the common enterprise, is to share equally in the profits and property

acquired, is without mutuality, founded on no consideration and void.

Mitchell v. O'Neale, 4 Nev. 504, 514.

The rule seems well established in the United States Courts that an extraordinary degree of certainty of proof in cases of a certain trust on the title of real estate is essential to establish the trust.

23 *A.L.R.* 1502—and note citing long list of cases.

THE TRIAL COURT ERRED IN NOT HOLDING THAT THE ALLEGED TRUST, IF ANY (AMENDED COMPLAINT, PAR. 6, R. p. 51), NOT BEING IN WRITING, IS VOID.

(Point 7, R. p. 108.)

SPECIFICATION OF ERROR NO. VIII.

The Nevada statute of frauds reads as follows:

“No estate, or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing.”

N.C.L., Sec. 1527.

In the instant case the complaint shows in effect that the title to the land was taken in the name of Edgar and Alfred Sadler and that they were to raise the necessary \$15,000.00 to pay for the land and the attor-

neys' fees, making a total of \$16,500.00. It is then set up that they were to take the title to this property in trust, etc. The case would seem to be within the rule *infra*, viz.:

“By the great weight of authority, an agreement on the part of one purchasing land with his own money, and taking the conveyance in his own name, to hold it in trust for another person, or to reconvey it to the grantor, is within the statute of frauds. Likewise, if a voluntary grantee in a conveyance orally agreed to hold the land in trust for the grantor or reconvey it upon demand, or to hold in trust for or to convey to a third person, the agreement is generally held to be within the statute of frauds, * * *”

26 *R.C.L.* 1197, Sec. 32, and N. 13, 14.

“Though there are some decisions which apparently hold to the contrary, it is the generally accepted rule that a mere verbal agreement by which one of the parties thereto promises to buy in at a judicial sale lands in which the other has an interest and to hold the same for the latter's benefit, does not, in the absence of other circumstances, create a trust enforceable in equity, even though the agreement is carried out to the extent that the promisor acquires the property at such sale. The agreement is within the statute of frauds.”

26 *R.C.L.* 1244, Sec. 91, and N. 6, 7.

THE TRIAL COURT ERRED IN NOT APPLYING THE RULE THAT WRITING MUST CONTAIN WITHIN ITSELF AND WITHOUT THE AID OF PAROL EVIDENCE, ALL THAT IS NECESSARY TO ENABLE THE COURT TO DECLARE A TRUST.

(Points 1, 2, 3, 6, R. pp. 106-108.)

SPECIFICATION OF ERROR NO. XIII.

“The writing must contain within itself, and without the aid of parol evidence, all that is necessary to enable the court to declare a trust, * * *”

65 *C.J.* 260, Sec. 41, and N. 9.

“There is no sufficient declaration of trust where the memorandum does not purport to create a trust * * * or where it simply relates to the trust property without setting out any trust.”

Humphrey v. Hudnall (Ill.), 84 N.E. 203.

“However, the intention (to create a trust) must be clearly proved; the language used must be such as to disclose with certainty an intention to create a trust. There must be either explicit language in expressing the trust or circumstances which show with reasonable certainty that a trust was intended to be created. The evidence must be clear, explicit, and convincing, not only as to the existence of the trust, but also as to its terms and conditions.”

Allen v. Hendrick (Ore.), 206 P. 733, 741, citing long list of cases.

See also:

65 *C.J.* 266, Sec. 47.

Parol evidence is not admissible for the purpose of showing or creating a trust as this would evade the statute of frauds.

Feeney v. Howard (Cal.), 21 P. 984, 985.

THE TRIAL COURT ERRED IN NOT HOLDING THAT PLAINTIFF'S ALLEGED CAUSE OF ACTION IS BARRED BY HIS LACHES IN DEFERRING SUIT FOR UPWARDS OF 25 YEARS AND UNTIL THE DEATH OF ALFREAD SADLER WHO WOULD OBVIOUSLY HAVE BEEN A MATERIAL WITNESS.

(Points 9, 10, R. pp. 109-110.)

SPECIFICATION OF ERROR NO. IX.

The alleged trust arose, if at all, on March 2, 1918. This action was commenced September 16, 1944,—26 years later. Irrespective of whether we take defendants' testimony for it or we take plaintiff's version, the result is the same. Plaintiff is barred by his own laches. Plaintiff had knowledge through his attorney-in-fact Alfred Sadler of the numerous mortgages, real and chattel, that Edgar Sadler was forced to execute in order to keep the ranch a going concern and avoid foreclosure.

So also, deeds, mortgages and other documents executed by the party claimed to be trustee and put of record are material evidence in an establishment of defense of laches because the beneficiary would be under a duty of examining into matters of a public record where any question as to the acknowledgment of the trust existed. See

William v. Woodruff (Colo.), 85 P. 90, 98.

Public records are constructive notice to plaintiff of their contents, where defendant has not been guilty of any affirmative act of deception to prevent suspicion or inquiry.

30 *C.J.S.* 555, Sec. 128, and N. 91.

While the amended complaint alleges that "since the death of Alfred Sadler on or about March 5, 1944 (Edgar Sadler) has repudiated the trust", this is far short of the requirement when a plaintiff is seeking to excuse a belated discovery and suit. He must aver that he has used due diligence to discover the facts and if he had the means of discovery in his power he will be held to have knowledge.

Fortner v. Cornell (Ida.), 163 P. (2d) 299, 304.

Where action was commenced for an accounting was brought more than 20 years after the right accrued, and the complaint alleged concealment by the defendant of the existence of partnership between him and the deceased, and further alleged that its existence was first discovered after the death of the ancestor, but without alleging the nature of the concealment, what or of whom any inquiries were made, or why they were not made sooner, and would not have been discovered before his death, it was held the petition was subject to a demurrer for laches.

Robertson v. Burrell (Cal.), 42 P. 1086, 1088.

Plaintiff had notice and knowledge of the repudiation of any trust by defendant Edgar Sadler through his agent and attorney-in-fact Alfred R. Sadler. Further, Alfred R. Sadler, one of the alleged beneficiaries

certainly had notice that Edgar A. Sadler disclaimed and denied any trust so far as plaintiff was concerned. Alfred, being one of the beneficiaries and having this notice, and the right of action being joint (and also being plaintiff's attorney-in-fact) knowledge which would bar the action as to one would bar it as to all, either in law or equity.

Robertson v. Burrell (Cal.), 42 P. 1086, 1088.

The case *infra* is identical with the case at bar, except that there the alleged trustee died before claimant filed suit, whereas here, the claimant deferred his suit until after Alfred Sadler, Edgar Sadler's cotenant as to the ranch, died. The case was decided by the Nevada Supreme Court May 5, 1925 and the facts, in substance, were:

One Celeste Pedroli died intestate leaving an estate consisting of horses, cattle, farming equipment and about 400 acres of land together with improvements with water rights appurtenant. He left surviving him a widow Felecia and three children, Charles Pedroli then 29 years of age and now deceased, Julius Pedroli, a son then aged 24 years of age, and Mary E. Pedroli, a daughter aged 20 years. Felecia Pedroli was appointed and qualified as administratrix of the estate of Celeste Pedroli and the estate of the latter was distributed one-half to the surviving widow and one-sixth to each of the three surviving children. Upon the death of the father, Charles Pedroli without objections on the part of his brother and sister assumed and entered into the exclusive management and control of the property. It was alleged that the property

was by the said brother and sister left in the care, custody and control of Chaarles. Continuously thereafter and until the time of the death of Charles he managed and controlled the property and exercised dominion over it and handled, traded, sold and otherwise disposed of the same and the rents, issues and profits and increase thereof, in his own name and in like manner as though he were the sole owner thereof, but always, it was alleged, subject to the rights of his brother and sister and as their agent and trustee insofar as their rights and interests were affected thereby, and for their use and benefit.

Felecitia Pedroli died intestate September 6, 1911, leaving an estate consisting of her undivided one-half interest and in the increase to the personal property and additions to the real estate. Her surviving heirs were the said children. Charles Pedroli was appointed and qualified as administrator of her estate on February 19, 1912 and entered upon the duties of his trust and took possession of all of the real and personal property and continued so until January 12, 1919.

On July 9, 1912 at the motion of Charles Pedroli as administrator, the estate of Felecitia was by decree of Court distributed as follows: an undivided one-third thereof to each of said children, which decree provided in part that upon the production of satisfactory vouchers by the administrator that he had paid all the sums of money due from him and deliver all the property of the estate to the parties entitled he be discharged from the said trust and that he and his sureties be released from all liability therefrom

thereafter to be incurred on account of the administration of this estate. Charles Pedroli never paid or delivered the property described in the decree to his brother and sister and was never discharged from his trust, and without objection on their part retained possession and control of all thereof, together with the rents, issues and profits thereof from the time of his appointment to the time of his death.

It was further alleged that during the time from the date of the death of the father to the date of the death of Charles Pedroli in January, 1919, the latter received and had said property in his possession and under his control and management, together with the rents, issues and profits, and increase thereof, and possessed, controlled, sold, disposed of the same without objection on the part of his brother and sister, as their agent and trustee, as though the same were his sole and separate property, but not adversely to their interest therein or in derogation of their rights thereto, but that at all times he admitted and recognized their rights as the owners of an undivided two-thirds interest in the property and the rents, issues, profits, and increase thereof, and that all of the property was either the original property belonging to the estate of Celeste Pedroli and the estate of Felecitia Pedroli, or was acquired by Charles Pedroli out of the rents, issues, profits and increase of the property of those estates while he was acting as the agent and trustee of his brother and sister; that an undivided two-thirds interest of the same is the property of the brother and sister.

It was further alleged that Charles Pedroli never at any time accounted to the brother and sister concerning his management, control and disposition of their interest in the property; that they permitted him to act as their agent and trustee with the full faith and confidence in his business management and integrity in the bona fide belief that he was more competent in that respect than either of them to manage the same to the best advantage and greatest profit to himself and them; that they believed that he would account fully and honestly to them at any time they or either of them made upon him a demand therefor; that for these reasons they never made a demand on him for an accounting and were always willing to leave the control, management, and disposition of the property in his hands with full faith and confidence in his judgment and integrity.

Demurrer was interposed on the ground of insufficiency of facts and that it appeared upon the face of the amended complaint that the cause of action therein set forth if any ever existed was barred at the time of the commencement of the action by the laches of the plaintiffs, and under the doctrine of equitable estoppel. The Court entered into an exhaustive consideration of the doctrine of estoppel, its application, etc. and then referred to the fact that the complaint showed that a great lapse of time, 22 years from the creation of the alleged trust, showed a lack of equity. That during all of this time Charles Pedroli was in possession of the property openly and notoriously exercising dominion over it as though it were his sole and separate property. He managed, controlled, and disposed of it,

and acquired and invested the profits from it in his own name. From the profits he acquired other property to the extent that at the time of his death the original property belonging to the estate of his father had been increased in amount from 400 acres of land and 100 head of stock cattle, and 20 tons of hay, to 880 acres; 300 head of cattle, 75 head of calves and 200 tons of hay. In addition he had acquired 15 bonds of the Lovelock Drainage District; 12 shares of stock of the Bank of Italy, Liberty Bonds of the par value of \$3600.00, a promissory note with accrued interest, a life insurance policy on the life of the deceased for the sum of \$5000.00 payable to his estate as the beneficiary and cash in the amount of \$12,000.00.

The Court stressed the fact that during the entire period of 22 years Charles Pedroli paid nothing to the brother and sister plaintiffs; he rendered no account of his management of the property to them nor was any accounting demanded of him by either of them. No reasons were alleged for their long delay in making claim except that Charles was more competent to manage the property for the best interests of himself and them and that he was honest and upright in all his business affairs and that they believed he would fully account at any time they made a demand on him.

The Court also especially mentioned and stressed the fact that it was incredible that in all of the years when the property was being managed profitably by Charles Pedroli that the brother and sister plaintiffs should have no desire to share in any portion of the profits. The Court also mentioned that all of the acts

of Charles were open and notorious and consistent with the absolute ownership, and then said that these facts, together with the prolonged absence and silence of the respondents during the lifetime of Charles concerning their alleged interest in the property present a case of grave doubt as to the existence of the trust claimed. The Court further stated that

“even if the trust relation were admitted the futility of entering on an investigation after such a lapse of time when the trustee is dead, to determine equitably what portion belonged to his estate and what portion belonged to respondents, is apparent. A court of equity would be unable, under the circumstances, to do justice to the parties. The injustice, if any, must fall upon the negligent.”

The Court then cited the case of *Kleinclaus v. Dutard* (Cal.), 81 P. 516, as being on the facts strikingly parallel to the case then before it and approved of the principles laid down by the California Court in the *Dutard* case.

Cooney v. Pedroli, 49 Nev. 55, 235 P. 637.

See also:

Freeman v. Hopkins (C.C.A. Cal.), 32 F. (2d) 756, 759.

“If it appears that an adverse party has lost any advantage which he might have retained if plaintiff’s claim had been asserted with reasonable promptness, or is exposed to any injury through inexcusable delay, a court of equity will not interfere to grant relief to the dilatory claimant.”

Miller v. Walser, 42 Nev. 499, 181 P. 437.

“Beneficiary has no right to relief against trustee, where, without adequate excuse, he delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose are so uncertain and obscure that it is difficult for the court to determine the matter.” (syll.)

Norfleet v. Hampson (Ark.), 209 S.W. 651.

“Any circumstances tending to obscure the truth of the matter, as the loss of witnesses through the efflux of time, may prompt a court of equity to apply the doctrine of laches.”

Miller v. Walser, 42 Nev. 499, 181 P. 437.

See also:

Noble Gold M. Co. v. Olsen, 47 Nev. 448, 66 P. (2d) 1005.

In the case *infra* the alleged trustee had received rentals from certain property which it was claimed by the plaintiff it was his duty to account for and that the lease on the property so required. The lease ended April, 1886, and the trustee lived for nearly 8 years thereafter, having died on February 20, 1894, and the action was not commenced until June 25, 1895, more than 9 years after the expiration of the lease. The trial Court found that the action was barred by laches and on appeal, the Supreme Court said that under the circumstances stated there was no warrant for disturbing the finding of the subject of laches and the order appealed from was affirmed.

Coyle v. Lamb (Cal.), 55 P. 901, 902.

“If, during the long delay, important testimony has been lost or destroyed, and the memory of the original transaction become hazy and indistinct, a court of equity may refuse to grant relief because of its inability to do certain and complete justice.”

Brissell v. Knapp (C.C.A. Nev.), 155 F. 809, 811—per Farrington, Judge.

“Some of the circumstances, in addition to the lapse of time, which will in equity constitute laches, are destruction of the muniments of title, the death or removal of the parties, the number of innocent purchasers who may be affected, radical changes in the condition or value of the property, and its speculative character.”

Miller v. Walser, 42 Nev. 499, 181 P. 437.

The mere assertion of a right or even a mere institution of the suit, does not relieve a person from the operation of the rule of laches; if he fails to prosecute his suit diligently, or if he fails to accompany his assertion of a right by the institution of a suit within reasonable time, the consequences are the same as though no suit had been begun.

21 *C.J.* 215;

Gill v. Colton (C.C.A. 4th), 12 F. (2d) 531, 535—citing a number of cases.

“Independently, however, of the statute of limitations, an accounting may be refused where the party seeking it has been guilty of laches or has allowed his claim to become stale.”

65 *C.J.* 896, Sec. 791, and N. 48—citing long list of cases.

To the effect that the general rule is that if the plaintiff has notice either actual or constructive of an alleged fraud or other transactions constituting breach, etc., though he has notice of only a part or his knowledge is incomplete, is still under the duty of making inquiry and it will be considered that he had good notice of all matters to which an inquiry diligently prosecuted would have led, see:

Davis v. Heynes (Kans.), 181 P. 566, 567.

TRIAL COURT ERRED IN FINDING REINHOLD SADLER WAS THE OWNER OF ANY INTEREST IN SAID RANCH BECAUSE THE ONLY CLAIM OF EVIDENCE THAT REINHOLD SADLER OWNED ANY INTEREST IN DIAMOND VALLEY RANCH WHEN HE DIED IS THAT HE OWNED 4000 SHARES OF STOCK OF HUNTINGTON AND DIAMOND VALLEY LIVESTOCK AND LAND COMPANY, AND THE ONLY EVIDENCE OF OWNERSHIP OF SAID SHARES BEING EXHIBIT 17, THE ALLEGED INVENTORY, WHICH IS NOT VERIFIED BY THE ADMINISTRATRIX, LOUISA SADLER.

(Point 4, R. p. 107.)

SPECIFICATION OF ERROR NO. X.

There is no evidence that the said Huntington etc. Co. owned the Diamond Valley Ranch on January 29, 1906 when Reinhold Sadler died. Per contra, Exhibit F shows that prior to 1906 Reinhold Sadler et ux., for a consideration of \$15,000.00 by a grant, bargain and sale deed conveyed the Diamond Valley Ranch to *Diamond Valley Livestock and Land Company*, a distinct corporation, and there is no evidence we know of showing that prior to January 29, 1906 the said Diamond etc. Co. title passed to said Huntington etc.

Co. The "Huntington Valley Stock and Land Company", a corporation, is alleged in the amended complaint to be the company in which Reinhold Sadler owned shares, whereas the 4000 shares set up in the alleged inventory are those of the "Huntington & Diamond Valley Live Stock and Land Co."

In view of the foregoing and it not being *idem sonans* that there was a corporation named "The Huntington Valley Stock and Land Company" is shown by fact it was named as a defendant in the quiet title suit No. 2380, the shares mentioned in the "Inventory" may as well have been in that corporation as in the one claimed by plaintiff, we say there is a fatal variance between the allegation and the proof, even conceding the so-called inventory constituted proof.

If further evidence were necessary, it is supplied by the amended complaint paragraph 2 where it is alleged:

"Reinhold Sadler, at the time of his death on January 29, 1906 was the owner * * * of and in the possession of certain real and personal property in the State of Nevada, among which were what is known as the Diamond Valley Ranch in Eureka County, Nevada, and the appurtenances, also live stock, ranch equipment and other personal property upon said ranch."

If, as alleged per supra, Reinhold Sadler was on January 29, 1906 the "owner" of the Diamond Valley Ranch, how could the Huntington etc. Co., in which

the 4000 shares were allegedly held, be also the "owner" of the same property and at the same time?

But further, and passing other objections, we say Exhibit 17 cannot constitute any legal evidence of ownership of said shares by mere fact of same being included in the inventory, because said inventory is not verified by Louisa Sadler as required by law. Nevada Compiled Laws, 1900, Sec. 2876, in force at the time, provides that the administrator or executor "shall take and subscribe an oath before any officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the deceased which has come to his possession or of which he has knowledge * * * The oath shall be endorsed upon or annexed to the inventory."

When signing of jurat by officer is omitted, this constitutes a fatal defect.

Lutz v. Kenney, 23 Nev. 279, 46 P. 257, 258—

"Jurat is essential";

State v. Board, 5 Nev. 317, 320;

2 *C.J.* 363, Sec. 109, and N. 91, citing cases;

2 *C.J.S.* 961, Sec. 21.

"An affidavit is not proved to have been made unless the jurat is authenticated by both such seal and signature."

Tunis v. Withrow (Ia.), 77 A.D. 117, 118.

Nor can the so-called "ancient document" rule apply. That rule

"* * * embraces no instrument which is not valid on its face and which does not contain every essen-

tial requirement of the law under which it was made. * * *”

22 *C. J.* 957, Sec. 1183, and N. 16;

Meegan v. Boyle, 19 How. 130, 15 L. ed. 577.

The ancient document rule merely creates a presumption that the document is genuine, and does not import verity to any of its recitals.

Gevin v. Calegaris (Cal.), 73 P. 851, 853;

Meegan v. Boyle, 19 How. 130, 15 L. ed. 577.

The heirs (according to plaintiff's case) have not treated the alleged inventory as valid. Per contra, *vide* Exhibit 8 diverting property from insolvent estate because it would be “disastrous” to run said property through the estate they “have acted in regard to their father's estate as if” no administration were attempted.

Meegan v. Boyle, 19 How. 130, 15 L. ed. 577.

TRIAL COURT ERRED IN GIVING EFFECT TO EXHIBIT 8 BECAUSE SAID EXHIBIT 8 PURPORTS UPON ITS FACE TO BE A MEMORANDUM OF AGREEMENT TO BE SIGNED BY EDGAR, ALFRED, BERTHA, LOUISA AND CLARENCE SADLER, AND BEING AT MOST, SIGNED BY ONLY TWO OF THEM, THE INSTRUMENT IS INCOMPLETE AND INVALID FOR ANY PURPOSE.

(Points 3, 6, R. pp. 107-108.)

SPECIFICATION OF ERROR NO. XI.

Exhibit 8 (R. p. 41), by its recitals upon its face, shows that it was intended to be signed by all of the

parties thereto,—five in number. But in fact was only signed by two, conceding that Edgar actually did sign the document. According to plaintiff's theory, each of the five owned undivided interests in the real and personal property and obviously could not be held to an agreement that the property be held for an indefinite period for an advantageous sale, etc., without their consent. The case is squarely within the rule of the case *infra*, where the Court held that it appearing the understanding between the parties being the agreement was to be reduced to writing and signed by the parties thereto, it had no binding effect.

Morrill v. Tehama M & M Co., 10 Nev. 125, 133-134.

“Plaintiffs entered upon land under an order agreement with defendant for a lease. The proposed lease was reduced to writing, while plaintiffs were in possession, signed by defendant and one of plaintiffs, and then left with defendant for the other plaintiff to sign, but he never did so, and there was no evidence that he ever accepted the lease, or knew of its existence. Plaintiffs afterwards, having left the premises at the command of defendant, brought an action on the lease. Held that the action could not be maintained by the plaintiff who had not signed or accepted the lease, and therefore a nonsuit was properly granted.” (syll.)

Castro v. Gaffey (Cal.), 31 P. 363.

Exhibit 8 conclusively showing on its face it was intended to be signed by the five parties therein

named (conceding that Edgar Sadler actually signed it), in fact is signed by only two, there is nothing to show that the unsigned parties had any knowledge that the paper was ever executed and certainly no evidence that they acquiesced or consented thereto. The case *infra* involved a somewhat similar situation involving a contract to which there were five parties, but only three signed, and in affirming judgment that the document never reached the state of being a contract, the California Supreme Court said:

“The instrument of September 2, 1872 was never completely executed. It is evident that upon an inspection of the writing itself that it was intended to be signed by all the parties to the contract upon which it was endorsed. These parties were the two principals in the contract and the two sureties upon the bond attached to and forming a part of the contract. It was signed by but three of these persons.”

Barber v. Burrows, 61 Cal. 404, 406.

The case *supra*, on the principle stated, was affirmed by the California Supreme Court in the case *infra*.

Jackson v. Torrence (Cal.), 23 P. 695, 700.

Obviously in the instant case, there being no signature of Clarence, Bertha or Louisa Sadler to Exhibit 8, and no allegation or showing that they ever accepted same in any of the legal methods constituting acceptance, if an action were brought against them or any of them by Alfred or Edgar to compel them to specifically perform by deeding their equity when a good price was obtained for the ranch, etc., they undoubt-

edly could successfully defend by showing that they had never signed the agreement.

Houser v. Hobart (Ida.), 127 P. 997, 1000. (The Idaho Statute of Frauds is practically identical with that of Nevada.)

THE TRIAL COURT ERRED IN NOT APPLYING THE RULE THAT PLAINTIFF CANNOT PREVAIL EXCEPT UPON THEORY THAT AS HEIR OF REINHOLD SADLER, HE (AS WELL AS THE OTHER FIVE) HAD AN EQUITABLE INTEREST OR ESTATE IN THE DIAMOND VALLEY RANCH. THE STATUTE N.C.L., SEC. 1527, INCLUDES EQUITABLE ESTATES AND HENCE SAID EXHIBIT 8 IS VOID UNDER SAID STATUTE BECAUSE NOT SIGNED BY ALL HOLDERS OF BENEFICIAL INTEREST.

(Points 1, 2, 3, 6, R. pp. 106-108.)

SPECIFICATION OF ERROR NO. XII.

“It is well settled that the Statute of Frauds embraces equitable estates in land. They are, even more than legal estates, exposed to the mischief which that statute was designed to remedy * * * But under the statute of frauds, an equitable interest in or title to land cannot be created, transferred, conveyed, or assigned by parol. The statute applies as much to the purchase of an equitable use in land as it does to a transfer of the legal title * * * Contracts for the sale of equitable interest in land are as much within the statute of frauds as contracts to convey the legal title.”

27 *C.J.* 202, Sec. 151, and note citing cases.

In the case *infra* the appellants claimed under an equitable assignment and the defense was that the

assignment not being in writing was void under the statute, citing *Miller v. Hathaway*, 27 Cal. 144. The Court held that while parol evidence was admissible to establish such a trust, it was also well settled that the interest of the *cestui que trust* could not be conveyed by parol (citing *Perry on Trusts*, Sec. 79) and continued:

“The interest of the *cestui que trust* is an equitable interest in land, and a sale or release of the same can only be proved by a conveyance, or other instrument in writing, subscribed by the party granting or releasing the same, or by his lawful agent under written authority, and executed with such formalities as are required by law. Nor is any contract or agreement by the *cestui que trust*, for the sale of such equitable estate or interest in land, valid, or admissible as evidence, unless said note or memorandum thereof, expressing a consideration, be in writing, and subscribed by the parties to be charged, or by his lawfully authorized agent. (Citing the Oregon Code.)”

And the Court continued, saying:

“The equitable estate of Mrs. Wagner is admitted, and existed at the time the verbal agreement was made with the appellants, unless she previously released the same by proper instrument in writing, to the respondent Jessie B. Lewis, in consideration of the real and personal property conveyed to her as alleged. It is unnecessary, however, to consider that question. The agreement was for the sale of an equitable estate or interest in land, which under the provi-

sions of our statute, above cited, is required to be in writing." (Citing cases.)

Chenoweth v. Lewis (Ore.), 39 Pac. St. Reports 150, 151, 9 Ore. 152.

The so-called trust agreement, Exhibit 8, on its face in no way indicates that the title should go or had gone to Alfred and Edgar Sadler, or either of them. For aught that appears from said Exhibit 8, the legal title may have gone to Clarence Sadler, or to any of the other three or four or five beneficiaries, in which case, of course, the person sought to be held as trustee could not be so held except by his signing the document claimed to be the declaration of trust. The foregoing is especially important in view of the fact that the deeds from Hermann J. Sadler, and it being alleged (paragraph 7, Amended Complaint) that on or about March 12, 1918 the Huntington and Diamond Valley Stock and Land Company duly transferred and conveyed said real property and appurtenances to defendant Edgar Sadler and to Alfred R. Sadler, and the president of said company also conveyed the same to Edgar A. and Alfred R. Sadler by deed recorded in the office of the county recorder of Eureka County, Nevada, on March 23, 1918. Copy of said deed is annexed to the original complaint as Exhibit I.

"A beneficial interest or estate in real property cannot be conveyed by parol."

27 *C.J.* 202, N. 37.

“Contracts for the sale of equitable interests in land are as much within the statute of frauds as contracts to convey the legal title.”

27 *C.J.* 202, Sec. 151, and N. 42.

The statute of frauds is applicable to all interests in land, whether corporeal or incorporeal, except where so provided, leases do not exceed a prescribed period.

37 *C.J.S.* 577, Sec. 69, and N. 18.

According to the allegations of the amended complaint and the whole theory of plaintiff's case, each of the parties (5 of them) were owners of beneficial title of the alleged trust property. Conceding for the argument, that Edgar Sadler signed, still Bertha Sadler and Mrs. Louisa Sadler did not sign, nor, apparently, did Clarence Sadler sign, because the document does not purport to be executed by Alfred R. Sadler as attorney-in-fact for Clarence. Inasmuch as Exhibit 8 does not segregate Edgar Sadler and Alfred Sadler as being in any way different towards the subject matter than the other heirs, the question necessarily arises as to whether Exhibit 8, not being signed by Clarence, Bertha or Louisa Sadler, the same is valid or of any legal effect whatsoever, under the statute of frauds. See:

N.C.L., Sec. 1527.

“It is well settled that the statute of frauds embraces equitable estates in land, inasmuch as they are, even more than legal estates, exposed to

the mischief which our statute was designed to remedy.”

37 *C.J.S.* 587, Sec. 81, and N. 47 citing cases.

“Equitable estates in realty, as well as legal estates, are within this clause of the statute (statute of frauds) if it is sought to create an equitable estate by an oral contract alone, or to enter into an oral contract for transferring such estate.”

2 *Page on Contracts* 2191, Sec. 1256, and N. 1.

Clarence, Bertha and Louisa Sadler, each having an equitable estate or interest in the land, the same was within the statute providing that any release thereof must be in writing, subscribed by the party granting the same.

Miller v. Hathaway, 27 Cal. 119, 144.

In the case *infra* the grantee in a conveyance undertook to defend by showing there was a parol agreement to surrender, rescind or abandon the trust which the grantor had created by the conveyance. The Court cited the Arizona statute of frauds (which is substantially the same as the Nevada statute) and ruled that a writing signed by the party to be charged was required to establish the surrender, rescission or abandonment of the trust as to the real property or the equitable interest affected.

Coleman v. Coleman (Ariz.), 61 P. (2d) 441, 443-444.

In the instant case the plaintiff Clarence Sadler appears to be in precisely the same position as one of the lessees in the case *infra* who was disabled from

maintaining the suit because he had not signed the document.

Castro v. Gaffey (Cal.), 31 P. 363.

To the effect a contract, if executory on both sides, is not valid unless it is enforceable against either party, in equity at least, unless the contract or the note or memorandum thereof is signed by each party, the reason being that in order to have specific performance there must be a mutuality of remedy as well as mutuality of obligations, see

2 Page on Contracts 2293, Sec. 1327.

See also:

Houser v. Hobart (Ida.), 43 L.R.A. (N.S.) 410,
127 P. 997.

In the instant case, according to plaintiff, because (as plaintiff claims) Reinhold Sadler owned 4000 shares of stock in a corporation claimed by plaintiff to have been the owner of the Diamond Valley Ranch, the plaintiff therefor had an equitable or beneficial interest in the Diamond Valley Ranch and hence necessity for consideration for alleged trust was dispensed with. But if so, then it necessarily follows that plaintiff's signature to the alleged trust was essential, in support of which we cite:

“The party whose signature is essential is the party who by law is enabled to declare the trust; and it has been decided that, whether the property is real or personal, the party enabled to declare the trust is the owner of the beneficial interest, who has therefore the absolute control over

the property, the holder of the legal estate being a mere conduit pipe.”

(The above is taken from Plaintiff's Op. Br. quoting: *Perry on Trust and Trustees*, 7th ed., pp. 90-92.)

For the reasons above presented to this Honorable Court appellant respectfully asks that the judgment and decree of the trial Court be reversed.

Dated, Reno, Nevada,
November 28, 1947.

Respectfully submitted,

H. R. COOKE,

JOHN D. FURRH, JR.,

Attorneys for Appellant.

No. 11,715

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR A. SADLER,

vs.

CLARENCE T. SADLER,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

SPRINGMEYER & THOMPSON,

First National Bank Building, Reno, Nevada,

Attorneys for Appellee.

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PAUL P. O'BRIEN,



Subject Index

	Page
Statement of the case	1
Summary of argument	20
Argument	23
A. All the beneficiaries of a trust are not indispensable parties to an action against a repudiating or defaulting trustee to establish the trust or to require the trustee to account	23
B. The trial court did not hold it could take possession of any property in the possession of the State District Court of Nevada in and for Ormsby County	28
C. Appellee's action does not seek to impeach or nullify the decree on the quiet title suit, but is brought in subordination to it and in recognition of it.....	29
D. The appellee established by clear, satisfactory and unequivocal evidence the creation on March 2, 1918 of an express trust, pursuant to an agreement between the heirs of Reinhold Sadler which was evidenced in writing subscribed by the parties declaring the same..	31
E. Appellee was guilty of no unreasonable or prejudicial delay in commencing suit to establish the trust six months after its repudiation by appellant	35
F. The evidence is clear that after the death of Reinhold Sadler in 1906, his heirs claimed through him an interest in the Diamond Valley Ranch, and other properties in Elko and White Pine Counties	42
G. The trust agreement dated March 2, 1918 (Exhibit 8) is signed by the parties declaring the trust, and is a sufficient memorandum	43
Conclusion	44

Table of Authorities Cited

I. Cases

Pages

A.

Alter v. Clark, 193 F. 153	30
Asher v. Bone, 100 Fed. 315	24
Atwood v. National Bank of Lima, 115 F. 2d 861.....	24

B.

Backus v. Backus, 207 Mich. 690, 175 N. W. 400	29
Baird v. Peoples Co., 120 F. 2d 1001	25
Boardman v. Watrous, 35 P. 2d 1106, 178 W. 690	38
Bowler v. Curler, 21 Nev. 158, 26 P. 226	30
Brown v. Chistman, 126 F. 2d 625	24
Buss v. Prudential Insurance Co., 126 F. 2d 960	25

C.

Chichester v. City of Newark, 162 F. 2d 598	24
Cooney v. Pedroli, 49 Nev. 55, 235 P. 637	37, 39
Coyle v. Lamb, 55 P. 901, 123 Cal. 264	41
Crutcher v. Joyce, 134 F. 2d 809	25
Currier v. Currier, 1 F.R.D. 682	24

D.

Dalton v. Dalton, 14 Nev. 419	30, 32
Davies v. Metropolitan Life Ins. Co., 63 P. 2d 529, 189 Wash. 138	38
De Korwin v. First National Bank of Chicago, 156 Fed. 858	24

E.

Edenborn v. Wigton, 74 F. 2d 374	24, 26
Enyart v. Merrick, 34 P. 2d 629, 148 Ore. 321	38

F.

Fleming v. Shay, 125 P. 761, 19 Cal. App. 276.....	36
Franz v. Buder, 11 F. 2d 854	24
Fortner v. Cornell, 163 P. 2d 299	39

H.

Hansen v. Bear Film Co., 168 P. 2d 946, 28 C. 2d 191....	38
Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657.....	23
Hughes v. Silva, 184 P. 415, 42 Cal. App. 785	38

I.

Issacs v. De Hon, 11 F. 2d 943	29
--------------------------------------	----

TABLE OF AUTHORITIES CITED

iii

K.	Pages
Kendrick v. Kendrick, 16 F. 2d 744.....	25
Keller v. Washington, 98 S. E. 880, 83 W. Va. 659	36
Kleinclaus v. Dutard, 81 Pac. 516, 147 Cal. 245	37, 40
Mc.	
McArthur v. Scott, 113 U.S. 340, 28 L. Ed. 1015, 5 S. Ct. 652.....	25
O.	
O'Brien v. Markham, 17 F. Supp. 633.....	25
P.	
Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260	23, 26
R.	
Robertson v. Burrell, 42 P. 1086, 110 Cal. 568	39
Rogers v. Penobscot Mining Co., 154 Fed. 606	24
Roos v. Texas Co., 23 F. 2d 171	24
Rottman v. Rottman, 204 P. 46, 55 C. A. 624	36
Ryan v. Seaboard etc. Co., 89 F. 397	25
S.	
Shields v. Barrow, 17 How. 130, 15 L. Ed. 158.....	25
Sime v. Howard, 4 Nev. 473	30
Simon v. Shaffer, 11 F. Supp. 450	25
Stephenson v. Stephenson, 171 S. W. 2d 565, 351 Mo. 8...	36
Stevens v. Smith, 126 F. 706	25
T.	
The Kermit, 76 F. 2d 363 (9 CCA)	38
Thomas v. Anderson, 223 Fed. 41	24
U.	
Union Pacific Ry. Co. v. Stewart, 5 Otto 279, 24 L. Ed. 431	31
W.	
Waterman v. Canal-Louisiana Bank, 215 U.S. 33, 54 L. Ed. 80, 30 S. Ct. 10	23, 26, 28
Wight v. Rohlfss, 72 P. 2d 142, 9 C. 2d 620	38
Williams v. Woodruff, 85 P. 90, 35 Colo. 28	38
Winters v. Winters, 34 Nev. 323, 123 P. 17, 1135	29

II. Textbooks

Page

American Jurisprudence:

Vol. 54, "Trusts", p. 56, secs. 45, 46 33

Vol. 54, "Trusts", p. 448, sec. 580 35

Vol. 19, "Equity", p. 348, sec. 503 36

Bogert, "Trusts & Trustees", Vol. 4:

p. 2748 36

p. 2784 36

Corpus Juris:

Vol. 65, "Trusts", p. 1021 29

Vol. 65, "Trusts", p. 259, sec. 40 33

Vol. 65, "Trusts", p. 262, sec. 42 33

Vol. 65, "Trusts", p. 263, sec. 43 33

Vol. 65, "Trusts", p. 1023, sec. 955 35

Vol. 30, "Equity", p. 550, sec. 126 36

Vol. 30, "Equity", p. 556, sec. 129 36

Perry, "Trusts & Trustees" (7th Ed.), Vol. 1, pp. 76-83,
pp. 90-92 33

Pomeroy "Equity Jurisprudence":

Vol. 4, p. 3417, sec. 1142 37

Restatement of Trusts:

sec. 46 33

sec. 48 33

sec. 219(2) 35

No. 11,715

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR A. SADLER,

Appellant,

VS.

CLARENCE T. SADLER,

Appellee.

BRIEF FOR APPELLEE.

Appellant's statement of the case is considered inaccurate and insufficient properly to present to the Court the evidence upon which the judgment of the trial court is based. Hence, appellee offers the following:

STATEMENT OF THE CASE.

Reinhold Sadler died on January 29, 1906. (R. 48) He left a will which was admitted to probate in proceedings instituted in the First Judicial District Court of the State of Nevada in and for the County of Ormsby, a copy of the will being attached to plaintiff's complaint as an exhibit. (R. 8-10.) The proceedings for the administration of the estate of Reinhold Sadler have never been closed. (R. 49.) Louisa Sadler, his widow, was appointed and qualified as

administratrix of his estate. (R. 49.) Reinhold Sadler's will disposed of his estate as follows: one-third to his wife, Louisa Sadler, and two-thirds in equal shares to his children, share and share alike, and "in case of death of either of my children, then I leave the portion to which it would be entitled to remaining ones and my wife share and share alike." (R. 9.) During his lifetime five children were born to Reinhold Sadler, namely Wilhelmina, Edgar, Alfred, Bertha and Clarence. Wilhelmina predeceased Reinhold Sadler, dying on September 5, 1903. (R. 49.) His widow, Louisa Sadler, and the other four children, Edgar, Alfred, Bertha and Clarence survived him. All are now dead except Clarence and Edgar. Bertha died, a single woman without issue, on April 29, 1921. Louisa Sadler died August 6, 1923, a widow without additional issue. No proceedings have been instituted for the administration of the estate of Louisa and Bertha. (R. 49-50.) Alfred Sadler died March 5, 1944 and Kathryn Powers Sadler is his duly appointed and qualified administratrix. Edgar Lane Plummer is the son of Wilhelmina Sadler, and is, therefore, an heir at law of Louisa Sadler. (R. 50.) (The foregoing facts are admitted by the pleadings.)

During his lifetime Reinhold Sadler acquired the Diamond Valley Ranch in Eureka County, Nevada (Ex. F-1), and deeded it to the Diamond Valley Livestock and Land Company, a corporation. (R. 602-5.) This corporation had ceased the user of its franchise for over thirty years prior to 1918, and had conveyed its property to the Huntington and Diamond Valley

Stock and Land Company, a California corporation (Ex. D attached to plaintiff's complaint, R. 33-34).

At the time of his death Reinhold Sadler owned 4,000 shares of the capital stock of the Huntington and Diamond Valley Stock and Land Company (Ex. 17—Inventory of R. Sadler Estate, R. 204-9), and an additional 1999 shares of said company which had been pledged to secure a loan to him from Minnie C. Sadler (Ex. 18—Claim of Minnie C. Sadler against estate of R. Sadler, R. 213-16).

After the death of Reinhold Sadler, the question of the ownership of the Diamond Valley Ranch, and other properties, was a matter of dispute between the heirs of Reinhold Sadler and the Hermann J. Sadler branch of the family, acting through the Huntington and Diamond Valley Stock and Land Company, a corporation.

On December 31, 1915 the Huntington and Diamond Valley Stock and Land Company brought an action in the Fourth Judicial District Court of the State of Nevada, in and for the County of Elko to quiet title to real property situated in Elko, White Pine and Eureka Counties, Nevada, the Diamond Valley Ranch being included in the property described in the complaint. Edgar, Alfred, Bertha, Clarence and Louisa Sadler were named as defendants, as was Louisa Sadler in her representative capacity as administratrix of the estate of Reinhold Sadler, deceased. (R. 50, 12-17.)

After the death of Reinhold Sadler, Edgar, Alfred, Bertha, Clarence and Louisa Sadler claimed the

Diamond Valley Ranch, or an interest therein, *as heirs* of Reinhold Sadler. This fact is clearly established by original Exhibits 2, 3 and 4, certified to this court, which are powers of attorney to Alfred Sadler from Edgar Sadler, Edgar Lane Plummer and Clarence Sadler, dated and recorded in December, 1912. *Exhibit 2*, the power of attorney from Edgar Sadler to Alfred Sadler dated December 28, 1912 authorizes Alfred Sadler to represent Edgar Sadler

“in all matters pertaining to his interest as an heir at law of the estate of R. Sadler, deceased, in general, and more particularly in reference to lands which the Huntington and Diamond Valley Stock and Land Company, a supposed California corporation holds under trust; the lands are situate in White Pine, Elko and Eureka Counties, State of Nevada.”

The authorizations granted by original *Exhibits 3 and 4* are similar in form, and the three powers of attorney were filed for record at the same time by defendant Edgar Sadler.

Further, the heirs of Reinhold Sadler filed a joint answer to the amended complaint in the quiet title suit, Edgar Sadler joining with the others. In this Answer (Ex. 1), these parties jointly admitted that they claimed an adverse interest in the lands and water rights involved in the action, and denied that their claim was without any right. (Para. 5 of Ex. 1.)

In December, 1917 and January and February, 1918 negotiations were under way between the plaintiff and the defendants in the quiet title suit looking toward

its settlement. Defendants were represented in Elko by the law firm of Curler and Castle, and in Reno by the law firm of Cheney, Downer, Price & Hawkins. Plaintiff, Clarence T. Sadler, was in the United States Army as a flying cadet (R. 251), and was represented in the negotiations and settlement by Alfred R. Sadler, acting under the power of attorney. (Ex. 3.) These negotiations are exemplified by plaintiff's exhibits 5, 6 and 7. (R. 150-157.)

In accordance with his expression of intention as stated in Exhibit 7, Edgar Sadler visited in Reno and Carson City, Nevada. A Stipulation (Ex. 16, R. 18-20), dated February 14, 1918, for the settlement of the quiet title suit was prepared and signed by the defendants. Among other things, the Stipulation provided that the title to the Diamond Valley Ranch should be quieted in Edgar and Alfred Sadler; that the title to the rest of the property should be quieted in plaintiff; that the money to be paid plaintiff should be the obligation only of Edgar and Alfred Sadler; and that the counterclaims be dismissed.

A letter (Ex. 20, R. 282-3) was written by Louisa Sadler to Alfred Sadler under date February 29, 1918, regarding the settlement, which reads, in part, as follows:

“Bertha and Myself wanted you and Edgar to write a agreement for how long you wanted the morgage of the Diamond Ranch and Cattle. You have to pay me \$50.00 per month and say who has to pay the money to me, and what date, so I am sure of the money. We want this in black and white so in case something should happen to you

or Edgar, we will have no trouble like with the Sadlers in the City and be sure of our property, and sell the Ranch for what it is worth at the end of that time and devide the money accordance to the Will, and you have to look out for Clance to. Edgar will have to pay for Clarence Insurance on his Police in May 24, if he is still in the Army, for Bertha says, she is not able to pay it, she paid out so much for Clarence. Edgar had all the income from the Ranch and he must pay it. You and Edgar should make another agreement to each other in black and white so you know what each one has to do, and in case something happing that you are safe of your property and money.

Allway make yourself safe in business so you will have no trouble later on."

March 2, 1918 is the date of the culmination of the negotiations for settlement of the quiet title suit and of the dispute which had existed since Reinhold Sadler's death between his heirs and the Huntington and Diamond Valley Stock and Land Company regarding the ownership of the Diamond Valley Ranch and cattle and the other properties situated in Elko and White Pine Counties. On March 2, 1918 the stipulation dated February 14, 1918 (Ex. 16, R. 18-20) was filed in the quiet title suit, and a Decree (Ex. D attached to plaintiff's complaint (R. 23-34) was entered in the action pursuant to the stipulation, by the terms of the Decree the title to the Diamond Valley Ranch being quieted in Edgar and Alfred Sadler. On March 2, 1918 Hermann J. Sadler, as attorney in fact for the Huntington and Diamond Valley Stock and Land

Company, deeded the Diamond Valley Ranch to Edgar and Alfred Sadler, and this action was confirmed by a deed from the corporation dated March 12, 1918. (R. 34-40.) On March 2, 1918 Alfred and Edgar Sadler executed a mortgage on the Diamond Valley Ranch (Defs. Ex. C, R. 538-43) to the Washoe County Bank as security for a loan of \$16,500.00. On March 2, 1918 Alfred Sadler and Edgar Sadler executed a chattel mortgage on the 250 head of cattle on the ranch to the Washoe County Bank as additional security for the same loan of \$16,500.00 (Defs. Ex. A, R. 231-32). It is admitted by the pleadings that the sum of \$16,500.00 so borrowed was disbursed as follows: \$15,000.00 to the Huntington and Diamond Valley Stock and Land Company in accordance with the settlement agreement, and \$1,500.00 to pay the fees of defendants' attorneys in the quiet title action.

On March 2, 1918 defendant Edgar Sadler, and his brother Alfred Sadler, signed a written trust agreement (Original Exhibit 8, R. 41) as follows:

“A Agreement

Dated March 2, 1918

Reno, Nevada
and
Carson City, Nevada

“This agreement is made between the following persons as follows:

Edgar Sadler of Eureka Co., Nevada
Alfred Sadler of Washoe Co., Nevada
Bertha Sadler of Ormsby Co., Nevada
Mrs. Louisa Sadler of Ormsby Co., Nevada

Clarence Sadler of Washington, D. C. by Alfred R. Sadler thru the Power of Attorney.

That as soon as possible the mortgage on the Diamond Ranch in Diamond Valley, Eureka County, Nevada be lifted the lawyers fees paid and that the first good chance for the best price possible this aforesaid ranch or property be sold and then that the remainder of the money be divided according to the last Will and Testament of Reinhold Sadler, deceased——

Mother desired fifty dollars each month that is by the 10th of each month.

A settlement of the ranch cattle with the same terms of the Will.

Edgar Sadler
Alfred Sadler”

On March 18, 1918 H. U. Castle of the law firm of Curler & Castle, Elka attorneys for the Sadler family, wrote a letter to Alfred Sadler as Follows (Ex. 19, R. 220) :

“Just received the deed from the Corporation conveying the Diamond Valley Ranch to you and Edgar which is in addition to the decree and the deed made by Hermann as attorney in fact. Also got the withdrawal from your aunt withdrawing all claims against your father’s estate. These papers I have sent to Cheney, so please call at his office and get the withdrawal and do what you wish with it.

“Have delivered the deeds to Van Fleet, I mean the Harvey and Wilhelmine Sadler patents have been turned over.

“I just want to add that on the day we got back to Elko, Edgar was offered \$40,000. for the ranch alone but refused to take it as he is holding for a better price in case you and he wish to sell.

Better keep this to yourself though as Bertha may raise or try to raise more hell."

Clarence T. Sadler testified that he first saw the trust agreement (Ex. 8) in May or June, 1918, while he was visiting his mother, Louisa Sadler, in Carson City, Nevada. (R. 28F.) Louisa Sadler died on August 6, 1923. Her funeral was held at Carson City, Nevada in August, and the three brothers, Edgar, Alfred and Clarence, and Clarence's wife, Reba (Dorris), were present for the funeral. Both Clarence Sadler and Reba Sadler testified that the question of selling the Diamond Valley Ranch was discussed, and that Edgar Sadler placed a value of approximately \$15,000.00 on Clarence's interest and agreed to make a definite effort to sell. (R. 284-6, 425-6.)

Clarence and Reba Sadler testified that in July, 1925 they visited the Diamond Valley Ranch enroute to Salt Lake City, Utah. A sale of the ranch was discussed and Edgar placed a price on it of \$75,000.00. (R. 286-7, 426.) On August 4, 1925, Clarence wrote Alfred a letter from Salt Lake City about his talk with Edgar at the ranch, and kept a copy. (Ex. 22, R. 293.)

On March 19, 1927 and September 14, 1927 Alfred Sadler wrote to Clarence reporting on conditions at the ranch. (Ex. 23 and 24, R. 295, 299-81.)

On September 15, 1928 Alfred Sadler wrote to Edgar suggesting that the latter should borrow \$5,000 on the security of the Diamond Valley Ranch so that Alfred might build a home for his family. (Ex. P, R. 579-81.)

Exhibit 25 (R. 303), consists of two letters, one dated January 18, 1929 from Alfred to Clarence, enclosing a letter dated December 22, 1928 from Edgar to Alfred, reporting on the refinancing of the ranch and repairs thereto.

Ethel Sadler (Edgar's wife) and their daughter, Violet, visited Clarence Sadler and wife in their home in Berkeley, California, in June, 1930. During her visit, a sale of the Diamond Valley Ranch was discussed, and Ethel was requested to obtain a sale price from Edgar on her return to the ranch so that the ranch could be sold, the mortgage paid, and the balance divided between the heirs of Reinhold Sadler. (R. 680, 681.) On July 12, 1930, after returning to the ranch, Ethel Sadler wrote Clarence's wife as follows (Ex. 41, R. 489):

“Edgar said he was willing to sell any time he could receive \$65,000 for the ranch alone. He said the way ranches are selling at the present time it is worth it. * * *

“I surely enjoyed every minute of my visit * * *

“With love from all to all,

Ethel.”

Clarence Sadler then wrote to Alfred, and received a reply from Alfred under date August 8, 1930 in part as follows (Ex. 43, R. 682):

“Your letter received and contents noted.

“From what you say, the property would have to be sold for about \$75,000 to get the commission and etc. to bring a net of \$65000.

“The data in regard to acreage would have to be secured from Edgar and average cut of hay

of the cultivated land, *the the* average from the meadow land.”

Clarence Sadler listed the ranch property for sale with real estate agents in Los Angeles and San Francisco. (R. 305-335.)

In February, 1931, Clarence Sadler and Alfred conferred with Edgar Sadler in the Golden Hotel in Reno, Nevada. Alfred and Clarence offered to sell their interests to Edgar and Edgar said he would try to borrow the money from the Reno National Bank. Edgar also agreed to supply complete information regarding the ranch so that it could be offered for sale through real estate agents. (R. 308-10.)

After this conference, on March 8, 1931 Alfred wrote Clarence as follows (Ex. 27, R. 311):

“Edgar and Ethel has not said anything further about our talk to Edgar and do not know what he is going to do. * * *

“I think you had better write Edgar to send you the data in regard to the ranch and this might sort of force them to say what they are going to do. I will tell him that you expect to be in Los Angeles about two months.”

On April 6, 1931, Alfred wrote Clarence again, and enclosed data regarding the ranch in the writing of Ethel Sadler on the stationery of the 35th Session, Assembly Chamber (Edgar was a member of the Assembly that session). Among other things, Ethel stated: “Considered one of the best ranches in Eureka Co. due to unlimited supply of water. Price \$65,000.”

Alfred, in his letter to Clarence, said (Ex. 28, R. 316-20):

“Edgar I guess is not going to take up the proposition of buying the interest in the ranch. I do not think he can get the money from what he said. I think that he tried to make a borrow from the Reno National Bank but they told him money was too tight. * * *

“I am sending you the data that they sent down to me to send to you since their return to the ranch. They did not take any trip to California as from what Edgar said his expenses were \$250 more than he received from the Legislature and that they did not have the money. So much for things in general and I guess Ethel was sore because I told her that you were down in Los Angeles and they had better send the data to you if they did not want to consider the proposition.”

This letter was followed by one from Alfred to Clarence on April 11, 1931, in which Alfred wrote (Ex. 29, R. 321):

“Just a few lines to let you know that I have written to Edgar to send you more data in regard to the ranch. The assessed value of the property in Eureka County and the rate of taxes per hundred dollars in the County. The price per head he would take for his cattle and the number that could be had on the property.

“Also to send you some snap shots of the Springs and the reservoir that is impounding the water. Which I hope that they will send to you before you return to Berkeley and while you are still in Los Angeles.”

And again on May 8, 1931, Alfred wrote Clarence (Ex. 30, R. 325):

“I have not heard anything from the ranch or any word from Edgar. Do not know whether he has sent you any more data in regard to same or not.”

On May 20, 1931, Alfred wrote Clarence as follows (Ex. 31, R. 329):

“I have not received any letter from out at the ranch and do not know whether they have sent you any more data or not. I guess they now are guessing what to do in regard to the same but judge he cannot get any money to take up the proposition.”

On June 16, 1931, Alfred had received a letter from Ethel Sadler (Edgar's wife) and he wrote Clarence, enclosing Ethel's letter. These two letters comprise Exhibit 32. (R. 332.) Ethel had written Alfred:

“We received a letter from some real estate firm that Clarence had spoken to wishing more data which I sent also some pictures of the spring and house and barns. I don't imagine anyone would buy a year like this and we wouldn't sacrifice our cattle after staying with them so long unless we got a good price. * * *

“We are as desirous to sell as anyone if we get a satisfactory price but I think it ridiculous to even talk sell a year like this—it seems to me it shows poor business ability.

“I will send whatever we receive from the Real Estate men on to you.”

Commenting on Ethel's letter, Alfred wrote:

"I enclose a letter that I received from Ethel. She says that she has sent some data to the real estate men in Los Angeles. It looks as if she is getting afraid that a buyer is going to show in regard to the ranch. I said that she said the price of the ranch was \$65000—\$13500—\$51500 cash and the buyer to assume the mortgage of \$13500, which I thought was a good price for the property. What they want in regard to cattle I do not know and they do not say. It looked as if they now are beginning to worry a little because she has went in Reinhold in buying cattle and prize is dropping in regard to same."

On July 28, 1932, Clarence wrote Alfred as follows (Ex. N, R. 573):

"I called at the Federal Farm Bank in Berkeley this morning and got some information on the ranch loan. I am enclosing sheet with the figures. Mr. Hodgson believes that we could increase the loan to \$18,500. Of course, if another application is made for money it will require another appraisal. The loan now is \$13000. You will note from the sheet that in March 1930 Edgar tried to borrow \$4000 more to invest in cattle. Don't you think it is about time he starts in buying our share instead of borrowing more money on the land investing same in cattle exclusively for his benefit?

"We should go after him to borrow this \$5000 from the bank and another \$5000 on his cattle and buy us out. Then he would have the whole thing and could do with it as he pleased. Instead he

wants to put more debt on the land entirely for his benefit. It is about time we made a move. Don't believe he made application for the money after our talk in Reno because there was no reference to the matter in the file. You will note the Bank's appraisal is over \$40,000 and says the ranch will bring \$30,000 on a forced sale. This would be about \$5,000 apiece after the loan is paid if the court at Carson should order it sold and distribution made of the money between the heirs.

"You will also note that a part of the loan went to Tom Dixon on cattle for the ranch. Of course, Edgar and Ethel now claim the cattle."

Another conference was held at the Golden Hotel in Reno, Nevada in March, 1933, between Edgar, Alfred and Clarence Sadler. Alfred and Clarence offered to sell their interests to Edgar for \$6,000 each, and Edgar said that if he could raise the money he would accept the offer. He said he would apply for an additional loan through Mr. Hatch at Elko, the representative of the Federal Farm Bank of Berkeley (R. 348-9).

On September 2, 1933, Alfred Sadler wrote Edgar a letter, in part as follows (Ex. M, R. 570):

"I just returned from a few days down in Berkeley and San Francisco. I was over to the Berkeley Land Bank which has the mortgage on the ranch. I inquired into conditions and find the situation good in regard to securing a loan.

"The question is as follows:—now since Reinhold is married and intends to live on the ranch and continue in this line, I thought that you and him

would like to buy my interest out in the property. I believe that the same could be done if you and Reinhold intend to go together and run the same."

Not having received a reply, Alfred wrote Edgar again on September 14, 1933, as follows (Ex. L, R. 568):

"I have not heard in regard to what you think about the buying of the interest I hold in the ranch.

"From the present looks of things, I will no doubt be let out of the position down here as they are short of funds to continue the same work in surveying the Public Lands. I guess I will have to give Clarence \$5000.00 cash for the interest he claims in the Estate. * * *

"Maybe Reinhold and Floyd would go in with you in regard to the Ranch proposition."

Alfred received a reply dated September 15, 1933, made a copy of it, and sent it to Clarence, the reply from Edgar being (Ex. 34, R. 352):

"Received your letter and contents noted in letter will go up to Elko in a few days as soon as we get second crop of hay up. And go see those people But do not think I can get that much money as they are slow in letting loan up this way on ranches. But will try them again."

On November 23, 1933, Alfred wrote Clarence again, and said (Ex. 35, R. 355):

"He (Edgar) was over to Elko the latter part of October and saw Mr. Hatch about the loan. It seems that instead of a man from Berkeley com-

ing to look in the matter The Government has sent a man from Salt Lake. This new man seems to be turning down the application for loans. As yet no man has come to the Ranch to look in *too* the matter. But Mr. Hatch told Edgar that the man from Salt Lake was turning things down right and left. * * *

“He (Edgar) said conditions was very bad in Elko Co. The trouble now about the loan seems to be in regard to the Ranges that the different farmers claim of the Public Area. Unless this matter is straightened out it will be a question of getting a loan.”

On December 8, 1933, Alfred wrote a follow-up letter in which he enclosed a copy of a letter to Edgar from L. F. Hatch, the Federal Farm Bank representative. These comprise *Exhibit 36*. (R. 361.) Alfred wrote:

“Therefore I judge he will not get a loan further on the ranch. * * * Conditions tough and they have sold no cattle as yet.”

Mr. Hatch had written Edgar:

“I would advise that you do not attempt to put an increased loan on your property at this time.”

On September 13, 1937, Alfred Sadler wrote Edgar Sadler a letter as follows (Ex. K, R. 565):

“I heard a report that you were selling all the cattle on the ranch and range; about 800 head for \$60.00 per head. What is going on and doing, have you a offer for the ranch property also? What is the plan, this is all news to me. Is the

program that you are quitting the ranch and let the Federal Land Bank foreclose on the loan that we borrowed on the ranch. If so I would like to know.

“Are you selling out to Reinhold and Floyd and they thinking of Running the ranch? If so, I do not see on what sort of plan they figure to do this.

“Cattle being sold might just sell the ranch and wind up the whole concern.

“Clarence will be hearing of this report and I will be receiving some hot letters to know where he is coming off in the interest he claims in the ranch. (a $\frac{1}{4}$ interest).

“He seems to know about that \$3000.00 loan that took a year to get from the Federal Land Bank and said he does not understand why you did not secure a commission loan of \$10000 and pay him \$6000 for the $\frac{1}{4}$ interest he owns.

“I suppose you are through with cutting and putting up the hay. It is warm weather down here at present. The children are all going to school now. With love and kisses from us all to you all.”

At the same time Alfred was in touch with Clarence, and wrote him on October 9, 1937, as follows (Ex. 37, R. 364):

“I have not heard from Edgar in regard to my letter.

“I asked him what was the amount of mortgage held by the Federal Land Bank on the property.

“How many head of cattle he sold this fall. Nothing in regard to buying us out, as yet, Ethel said

in her letter that the boys did not have any money to buy.”

On October 15, 1937, Edgar replied to Alfred's letter of September 13, 1937, and said that the balance due on the mortgage on the ranch was \$12,225.76, that there were no buyers and he could not sell, and that he had been lucky to hold onto the ranch the past seven years. Alfred sent this letter to Clarence, writing him on October 18, 1937 (the two letters comprise Exhibit 38, R. 367). Alfred wrote:

“Herewith is the letter that I received from Edgar relative to the ranch.

“He has not sold any Cattle but waiting for a better price.

“In fact the situation is, he has to get the O.K. from the Loan Bank before he can sell.”

On September 24, 1937, Alfred had also written the Eureka County Assessor for a copy of the 1937 tax roll. He sent a copy of this letter to Clarence, and added a note to Clarence at the bottom. The note is as follows (Ex. 39, R. 370):

“I wrote a letter on my return saying it was reported they sold 800 head of cattle at \$60.00 per head. And asked him what his plans were now going to be about the ranch, whether the boys were going to run the ranch. You see the letter that came back. And if he would buy our interest in the same.”

While on a deer hunting trip in October, 1938, Clarence Sadler stayed at the Diamond Valley Ranch

and discussed with Edgar the possibility of selling the ranch. (R. 371.)

In May or June, 1939, Edgar and Ethel Sadler visited Clarence and Reba Sadler in Berkeley during the Fair, and at the time of the funeral of Ethel's brother, Tom. The ranch was discussed and Edgar said he did not know just when he would sell. Clarence said he wanted to get his money out of it, and suggested that the boys, Reinhold and Floyd might be able to buy them out. (R. 372-3, 427.)

Alfred Sadler died March 5, 1944. (R. 244.) On March 6, 1944, Edgar and Clarence were present in Alfred's home in Reno, and Edgar for the first time denied that Clarence had any interest in the ranch. (R. 375.) Subsequently, Clarence learned that at a conference in Mr. Kearney's office Edgar had denied that he had signed any trust agreement, and again repudiated Clarence's interest. (R. 687.) On May 6, 1944, Clarence wrote Edgar requesting a recognition of his interest as a beneficiary of the trust. (Ex. J.) This letter was written prior to the institution of this action, was received by Edgar and was not answered by Edgar. (R. 653, 657.)

SUMMARY OF ARGUMENT.

There is no absence of indispensable parties. All the beneficiaries of a trust are not indispensable parties to an action against a repudiating or defaulting trustee to establish the trust or to require the trustee to ac-

count. This principle is established by controlling federal authorities, which distinguish those cases relied upon by Appellant. Edgar L. Plummer requires no special treatment as an alleged indispensable party, because Appellee did not seek, and the trial court did not decree, an order fixing Appellee's aliquot share, or its distribution to him.

The decree of the trial court operating *in personam* against Edgar Sadler to enforce a trust agreement does not purport to interfere, and does not interfere, with an hypothesized possession of the trust property by the state probate court. Edgar Sadler cannot avoid his fiduciary obligations by setting up a claimed adverse title or interest in the trust property in some third party.

Appellee does not seek to impeach, set aside, or collaterally attack the decree in the Elko County quiet title suit. The quiet title decree entered March 2, 1918 does not estop Appellee, because he recognizes it and asserts equities arising under it and concurrently with it. The quiet title decree was entered by consent, and in part performance of an agreement of settlement, and is not a bar to a suit for an appropriation of the fruits of the settlement.

Appellee established the trust by clear, satisfactory and unequivocal evidence, the agreement being memorialized by a memorandum sufficient to satisfy the Statute of Frauds.

The finding of the trial court that Appellee was not guilty of laches or unreasonable delay is convincingly

supported by the evidence. Appellant consistently recognized the interests of his brothers through the years until March 6, 1944, when he first repudiated them. Laches will not defeat an express trust unless there is an unequivocal repudiation by the trustee, followed by unreasonable delay which prejudices the trustee. A close family relationship rebuts the imputation of laches and a continued acknowledgment of the trust is sufficient to account for any delay. Appellant shows no prejudice to him resulting from the delay. The evidence offered is not obscure, but is clear and convincing. The decision of the trial court, rejecting the defense of laches, is controlling unless it is shown to be so clearly wrong as to amount to an abuse of discretion.

The evidence clearly shows that after the death of Reinhold Sadler, his heirs claimed through him some interest in the Diamond Valley Ranch. We are not now interested in re-trying the issues in the quiet title suit. It does not appear that a finding regarding the ownership of the ranch at the time of Reinhold Sadler's death, or the ownership of any corporation stock, is material, although the finding made by the Court is supported by the evidence.

The trust agreement, Exhibit 8, is a sufficient memorandum, and is unilateral in character, the other Sadler heirs having fully performed their obligations under the settlement agreement. It is signed by the parties sought to be charged. Other contemporaneous documents may be construed with it.

ARGUMENT.

ALL THE BENEFICIARIES OF A TRUST ARE NOT INDISPENSIBLE PARTIES TO AN ACTION AGAINST A REPUDIATING OR DEFAULTING TRUSTEE TO ESTABLISH THE TRUST OR TO REQUIRE THE TRUSTEE TO ACCOUNT.

The first two points in Appellant's Brief assert the argument that the trial court lacked jurisdiction because of the absence of indispensable parties. It is claimed that Edgar L. Plummer and a legal representative of the estate of Louisa Sadler must have been joined as parties for the court to have the power to determine the controversy presented by the pleadings. These absent parties are co-beneficiaries of the trust sought by Clarence Sadler to be established against Edgar Sadler, and the question presented is whether all the beneficiaries of a trust must be joined as parties in an action of this character.

It has been established since federal procedure was in its infancy that the other beneficiaries of an alleged trust are not indispensable parties to an action by one or some of the beneficiaries against the trustee to establish the trust and for an accounting. The interests of the beneficiaries are separable and are not "joint" within the meaning of the test applied in determining who is an indispensable party. This was the law under the former equity practice, and is the present law under the Federal Rules of Civil Procedure (Rule 19).

Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260;
Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657;
Waterman v. Canal-Louisiana Bank, 215 U.S.
 33, 54 L. Ed. 80, 30 S. Ct. 10;

Rogers v. Penobscot Mining Co., 154 Fed. 606;
Atwood v. National Bank of Lima, 115 F. 2d
 861;

De Korwin v. First National Bank of Chicago,
 156 Fed. 858;

Asher v. Bone, 100 Fed. 315;

Currier v. Currier, 1 F.R.D. 683;

Roos v. Texas Co., 23 F. 2d 171;

Thomas v. Anderson, 223 Fed. 41.

The same rule applies to tenants in common of a legal, rather than equitable, estate. See *Chichester v. City of Newark*, 162 F. 2d 598, and cases there cited.

Appellee's Amended Complaint in the instant case sought only the establishment of the trust and an accounting. (R. 55.) The court decreed the trust against Edgar Sadler and ordered an accounting. (R. 95-97.) That others, not parties, may share in the benefits of the litigation is immaterial. Their non-joinder has not prejudiced them.

The authorities cited by Appellant are distinguishable. The opinions in *Roos v. Texas Co.* (supra) and *Atwood v. National Bank of Lima* (supra) are guides to the distinguishing elements. The principal object of the action involved in certain of Appellant's citations was to fix one beneficiary's share of a fund as against other beneficiaries (*Brown v. Chistman*, 126 F. 2d 625; *Edenborn v. Wigton*, 74 F. 2d 374; *Franz v. Buder*, 11 F. 2d 854). Obviously, the absent beneficiaries are indispensable parties, as they are the persons adverse in interest to plaintiff. No such relief was sought or granted in the instant case. In others

of Appellant's authorities (*Baird v. Peoples Trust Co.*, 120 F. 2d 1001; *Stevens v. Smith*, 126 F. 706; *McArthur v. Scott*, 113 U.S. 340, 28 L. Ed. 1015, 5 S. Ct. 652) the indispensability of remainderman or the trustee in a suit involving the interpretation of a trust instrument was the question presented. There the rights of persons having an indivisible succeeding interest, rather than a severable present interest, were to be affected by an action to which they were not parties. In a partition suit (see appellant's cases, *Kendrick v. Kendrick*, 16 F. 2d 744; *Buss v. Prudential Insurance Co.*, 126 F. 2d 960) all persons sharing as partitioners in the property to be partitioned are clearly indispensable. The object of the actions in other precedents relied upon by Appellant (*Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Simon v. Shaffer*, 11 F. Supp. 450; *O'Brien v. Markham*, 17 F. Supp. 633; *Ryan v. Seaboard etc. Co.*, 89 F. 397) was to rescind or cancel a contract, deed, will or trust instrument, and the courts correctly held that all persons whose rights depended upon contract, deed, will or indenture sought to be cancelled or rescinded were indispensable parties. Similar relief is not requested in the instant case. Appellee submits that the dictum in the case, *Crutcher v. Joyce*, 134 F. 2d 809, is wrong, and is not supported by the authority of *Baird v. Peoples Trust Co.*, 120 F. 2d 1001, upon which it relied. As suggested above, the latter case held only that remaindermen are indispensable parties to an action by a life beneficiary against the trustee complaining of the management of the trust property.

The balance of the federal decisions cited by Appellant, although helpful for general statements of legal principles, do not purport to present factual situations even faintly similar to the facts of the instant case.

It is respectfully suggested that the problem of indispensable parties in this case is governed by the controlling federal decisions which have been cited. Although the great majority of the decisions of state courts, relied upon by appellant, fall into the distinguishing classes heretofore suggested, those that do not, either in decision or dictum, may well be disregarded. The decisions by federal courts have been reached in the light of other restrictions on federal jurisdiction, particularly those involved in the concept of diversity of citizenship and these limitations are not present in the state tribunals. Hence, authorities from state courts are not helpful in the instant case, especially where the exact question has been decided by the Supreme Court of the United States and other federal courts. These federal decisions have consistently held that a decree may be so framed as not adversely to affect the rights of an absent co-beneficiary of a trust. (*Payne v. Hook*, supra, *Waterman v. Canal-Louisiana Bank*, supra, *Edenborn v. Wigton*, supra).

The first portion of Appellant's argument (opening brief pages 6-10) seeks to place Edgar L. Plummer in a unique position as an indispensable party. The argument is based on the Court's finding (R. 94) that Clarence Sadler is the equitable owner of an undi-

vided 29% of the trust property. This follows the allegation of the Amended Complaint (R. 54), which was deemed proper to show that Appellee's interest in controversy exceeded the jurisdictional sum of \$3,000.00. Appellant's computation of the interest of Edgar L. Plummer in the trust fund is reached by granting him the interest his mother, Wilhelmina Sadler Plummer, who predeceased testator, would have had had she survived her father, Reinhold Sadler. Appellee's computation of his 29% interest is reached by giving effect to the "gift over" clause in Reinhold Sadler's will (R. 9).

Whichever method of computation may ultimately be adopted is irrelevant to the issues on this appeal. Appellee did not seek by his Amended Complaint, and the Court did not grant in its Decree (R. 101-3), a determination of his beneficial interest, or a distribution of that interest to him. The Court decreed in personam against Edgar Sadler that he holds and possesses the Diamond Valley Ranch, appurtenances, livestock and equipment in trust for "plaintiff, Clarence Sadler, the heirs of Alfred R. Sadler, deceased, Edgar L. Plummer, and for defendant Edgar A. Sadler, in the amount and shares to which each of the above named individuals may be entitled by the terms of the last will and testament of Reinhold Sadler, deceased, and the Statutes of Descent of the State of Nevada."

It is elementary that a party may appeal only from action taken by the Court adversely affecting his interests. The trial Court in this case took no action

whatever purporting to fix the distributive share of any beneficiary, but expressly reserved any such determination for future action (R. 102-3).

THE TRIAL COURT DID NOT HOLD IT COULD TAKE POSSESSION OF ANY PROPERTY IN THE POSSESSION OF THE STATE DISTRICT COURT OF NEVADA IN AND FOR ORMSBY COUNTY.

Appellant's argument (Appellant's Brief, pages 33-35) is based on factual assumptions which are entirely foreign to the instant case. The present action is an equitable action in personam against Edgar A. Sadler to determine and establish his status with regard to the Diamond Valley Ranch, cattle and appurtenances, under a trust agreement executed twelve years after the death of Reinhold Sadler. The decree entered by the Court operates in personam against the defendant. Such an action is expressly authorized by the decision in *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 54 L. Ed. 80, 30 S. Ct. 10, cited by Appellant.

Authorities cited by Appellant to the effect that the federal courts cannot administer the estate of a deceased person are not pertinent here. This action is not brought by, for the benefit of, or against the estate of Reinhold Sadler, and Reinhold Sadler's will is material to the case only because it was incorporated by reference in the trust agreement to identify, and fix the interests of, the beneficiaries under the trust agreement. The evidence does not show, and

the trial court did not find (R. 88) that Reinhold Sadler owned the trust res at the time of his death, or that it was ever claimed or possessed by the administratrix as part of his estate (R. 204), although it is true that in the litigation with the Huntington and Diamond Valley Stock and Land Company the Reinhold Sadler heirs asserted their defenses jointly in contesting that quiet title suit, and so acted in the settlement of it.

It seems to Appellee that Appellant's contentions are fully answered by the similar factual situation, and holding of the Nevada Supreme Court, in the case of *Winters v. Winters*, 34 Nev. 323, 123 P. 17, 1135. This defendant, Edgar A. Sadler, may well deem it necessary to grasp at straws to evade his trust responsibilities, but he cannot avoid the fiduciary obligations which he assumed by seeking to set up a claimed adverse title or interest in the trust res in some third party. Cf. 65 *C. J.* "*Trusts*", 1021, *Backus v. Backus*, 207 Mich. 690, 175 N.W. 400; *Issacs v. De Hon*, 11 F. 2d 943.

**APPELLEE'S ACTION DOES NOT SEEK TO IMPEACH OR NUL-
LIFY THE DECREE IN THE QUIET TITLE SUIT, BUT IS
BROUGHT IN SUBORDINATION TO IT AND IN RECOGNITION
OF IT.**

The decree entered in the quiet title suit in Elko County, Nevada on March 2, 1918 was entered by consent, to effectuate a compromise agreed upon by the parties to the action. The facilities existing inci-

dent to the pendency of the quiet title action were utilized to accomplish the conveyance of the legal title to the Diamond Valley Ranch to Edgar and Alfred Sadler. Appellee is not attacking the judgment in the quiet title suit, but is asserting rights arising concurrently with its entry, which are not inconsistent with it.

The situation here involved is no different in principle from that presented by a suit to establish a resulting or constructive trust in the face of a warranty deed to the alleged trustee, or an express trust based on a declaration of trust executed by a grantee under a warranty deed, or to have a deed absolute declared to be a mortgage. The contention in those cases that the deed is conclusive and cannot be collaterally attacked has uniformly been rejected, and it has been pointed out that the plaintiff by his action is not attacking the deed, or its effect, but recognizes it and asserts equities arising under it, and not in conflict with it. Cf. *Dalton v. Dalton*, 14 Nev. 419; *Bowler v. Curler*, 21 Nev. 158, 26 P. 226; *Sime v. Howard*, 4 Nev. 473; *Alter v. Clark*, 193 F. 153.

Here, Clarence Sadler is not attempting to impeach, set aside or collaterally attack the decree entered in the Elko County quiet title suit. He recognizes it, and asserts that it was entered with his consent and the consent of the other parties to the Stipulation (R. 18) as one step in the fulfillment of the settlement agreement entered into between them. He now seeks to enforce in this action the unexecuted portion of that agreement. From this point of view, a complete

answer to Appellant's contentions is found in the decision of the Supreme Court of the United States in the case, *Union Pacific Ry. Co. v. Stewart*, 5 Otto 279, 24 L. Ed. 431, where it is said: "The decree of the Kansas State Court having been entered by consent, and in part performance of the agreement of settlement, is not a bar to a suit for an appropriation of the fruits of the settlement."

THE APPELLEE ESTABLISHED BY CLEAR, SATISFACTORY AND UNEQUIVOCAL EVIDENCE THE CREATION ON MARCH 2, 1918 OF AN EXPRESS TRUST, PURSUANT TO AN AGREEMENT BETWEEN THE HEIRS OF REINHOLD SADLER WHICH WAS EVIDENCED IN WRITING SUBSCRIBED BY THE PARTIES DECLARING THE SAME.

The portion of Appellant's Brief from pages 44 to 56 complains, in varying ways, of an alleged insufficiency in Appellee's proof. As a preface to the argument herein, Appellee for the convenience of the Court has summarized the evidence in a Statement of the Case, to which the attention of the Court is respectfully directed.

Appellee conceded in the trial court that the burden was on him to establish the trust by clear, satisfactory and unequivocal evidence. Appellee challenges appellant to show that the trial court did not apply the rule in deciding the case, or that the burden of proof, as stated, was not met by Appellee.

Insofar as proof of an oral agreement or understanding as found by the trial court (R. 91), is concerned preceding the execution of the Stipulation

dated February 14, 1918 (R. 18), the writing of the Louisa Sadler letter dated February 29, 1918 (R. 282) the filing of the Stipulation in the quiet title suit on March 2, 1918 (R. 21), the entry of a decree in the quiet title suit on March 2, 1918 (R. 23), the execution of a deed on March 2, 1918 (R. 35), the execution of a real and a chattle mortgage on March 2, 1918 (R. 538, R. 231) and the signing of Exhibit 8 on March 2, 1918 (R. 41) we can do no better than to quote the statement of the trial court in its Opinion (R. 86): "The events of March 2, 1918, the stipulation, the decree, the deed and the agreement, Exhibit 8, did not just happen. They resulted from an understanding and agreement between Edgar Sadler, Alfred Sadler, Bertha Sadler and Mrs. Louisa Sadler. * * *" Judges, when they take office, are not required to abandon common sense and shed the knowledge they have gained from practical experience.

Much less than the evidence produced in this case has been sufficient to establish a trust by clear and convincing evidence. For example, in the case of *Dalton v. Dalton*, 14 Nev. 419, an absolute deed was defeated and a constructive trust imposed on real property entirely on oral testimony, and in so holding the Nevada Supreme Court reversed the decision of the trial court.

Appellant also relies upon the Statute of Frauds, the pertinent section of the Nevada statute being quoted on page 53 of Appellant's brief, but it is not clear to Appellee from the brief in what particular

respect the fully documented series of transactions proved by Appellee is deemed insufficient to satisfy the Statute referred to. The principles relied upon by Appellee are stated in the Restatement of Trusts as follows:

Restatement of Trusts, Sec. 46

“A memorandum properly signed is sufficient to satisfy the requirement of the Statute of Frauds if, but only if, it sets forth with reasonable definiteness the trust property, the beneficiaries and the purposes of the trust.”

Restatement of Trusts, Sec. 48

“A memorandum may be sufficient to satisfy the requirements of the Statute of Frauds, although consisting of several writings.”

“*Comment*: The memorandum may consist of several writings * * * though one writing only is signed (by the party sought to be charged) if it appears from examination of all the writings that the signed writing was signed with reference to the unsigned writings.”

The following general text authorities are cited in support of the “Restatement”:

Perry on Trusts and Trustees (7th Ed.) Vol.

I, pp. 76-83, pp. 90-92;

65 *C. J.* “*Trusts*”, p. 259, sec. 40;

65 *C. J.* “*Trusts*”, p. 262, sec. 42;

65 *C. J.* “*Trusts*”, p. 263, sec. 43;

54 *Am. Jur.* “*Trusts*”, p. 56, secs. 45, 46.

If the trust agreement, Exhibit 8, signed by Edgar and Alfred Sadler be deemed uncertain in any par-

ticular, it may be construed in connection with the circumstances surrounding its execution, and the other documentary evidence which was part of the some transaction.

Appellant again adverts to the Statute of Frauds in the last section of his brief (pp. 72-78) stating: “* * * the statute N.C.L., sec. 1527, includes equitable estates and hence said exhibit 8 is void under said statute because not signed by all holders of beneficial interest.” Appellee hesitates to try to answer the argument under this heading because it is incomprehensible to him. Admitting the premise that transfers of equitable estates are governed by the statute of frauds, Appellee fails to see its application to the facts of this case. The agreement, Exhibit 8, is signed by Edgar and Alfred Sadler, the holders of the legal title, the parties “creating, granting, assigning, surrendering or declaring” the trust. If appellant means by his argument that the Elko County quiet title suit could not have been settled without the consent of all the parties, why ignore the Stipulation, (R. 18) signed by all? If he intends to suggest that after March 2, 1918, the beneficial owners of the trust property could transfer their interests only in writing, this we admit and we disclaim any contention that any subsequent transfers have taken place. Surely there is nothing in the evidence tending to show that Clarence, Bertha or Louisa Sadler have “released” their interests, or have “surrendered, rescinded or abandoned” the trust (see Appellant’s Brief p. 76).

APPELLEE WAS GUILTY OF NO UNREASONABLE OR PREJUDICIAL DELAY IN COMMENCING SUIT TO ESTABLISH THE TRUST SIX MONTHS AFTER ITS REPUDIATION BY APPELLANT.

The trial court found that there was no denial, disclaimer or repudiation by defendant-appellant Edgar A. Sadler of the trust relationship at any time prior to March 5, 1944 (R. 94). This action was commenced on September 6, 1944. The trial court found that plaintiff-appellee has not been guilty of laches in the bringing and maintaining of this action (R. 94). These findings are based on the evidence summarized in the Statement of the Case, at the commencement of this brief, and in so finding the trial court inferentially and necessarily discredited the testimony of appellant Edgar A. Sadler, and his wife, Ethel Sadler. The determination of the credibility of the evidence and the testimony of witnesses is within the exclusive province of the trial court. Further, the evidence so summarized clearly establishes a consistent recognition of the trust through the years and until March 6, 1944, rather than a repudiation of it.

The doctrine of laches is not available to defeat an express trust unless the trustee has clearly and unequivocally repudiated the trust with the knowledge of the beneficiary, and the beneficiary has thereafter delayed bringing an action for a long period of time to the prejudice of the trustee.

65 *C. J.* "*Trusts*", p. 1023, sec. 955;

54 *Am. Jur.* "*Trusts*", p. 448, sec. 580;

Restatement of Trusts, Sec. 219 (2);

Keller v. Washington, 98 S.E. 880, 83 W.Va. 659;

Stephenson v. Stephenson, 171 S.W. 2d 565, 351 Mo. 8.

When positive evidence exists which proves that defendant has all along recognized the plaintiff's right, delay on the part of plaintiff in bringing suit will be excused and the continued acknowledgement by defendant of plaintiff's right is sufficient to account for any delay by plaintiff in bringing suit to enforce it.

19 *Am. Jur. "Equity"*, p. 348, sec. 503;

Bogert "Trusts & Trustees", Vol. 4, p. 2748;

30 *C.J.S. "Equity"*, p. 550, sec. 126;

Fleming v. Shay, 125 P. 761, 19 Cal. App. 276.

A family relationship existing between the trustee and beneficiary making a settlement out of court more natural, rebuts the imputation of laches.

Bogert "Trusts & Trustees", Vol. 4, p. 2784;

Stephenson v. Stephenson (supra);

Rottman v. Rottman, 204 P. 46, 55 C.A. 624;

30 *C.J.S. "Equity"*, p. 556, sec. 129.

Laches does not result from delay alone, but from a delay which is prejudicial to the party asserting laches as a defense. In the instant case, no claim of prejudice to Edgar A. Sadler resulting from the delay is made, other than the death of Alfred Sadler. It seems to Appellee that the evidence clearly shows that the death of Alfred Sadler was prejudicial to Appellee, rather than Appellant; that Edgar Sadler

necessarily and cautiously waited until after Alfred's death to deny his fiduciary obligations; that Alfred Sadler would have been Appellee's rather than Appellant's witness, and should we surmise that Alfred would have testified for Edgar, his testimony would have been so thoroughly impeached by the letters and other documentary evidence as to render it worthless. In the absence of a showing of prejudice resulting from the delay, the equitable defense of laches cannot be sustained.

Pomeroy's Equity Jurisprudence, Vol. 4, p. 3417, sec. 1142;

Cooney v. Pedroli, 49 Nev. 55, 235 P. 637.

Here it does not appear that Appellant has lost an advantage by reason of the death of Alfred Sadler. On the contrary, the loss has been suffered by Appellee. Alfred's death is the only claim of prejudice we can discern from a reading of Appellant's brief. Further, in the instant case the evidence has not been obscured by the passage of time—it is not uncertain, conflicting or doubtful. The proof establishing the trust relationship is clear, convincing and practically uncontradicted.

The determination of an alleged defense of laches rests upon the particular circumstances of each case.

Cooney v. Pedroli (supra);

Kleinclaus v. Dutard, 81 Pac. 516, 147 Cal. 245.

The question of laches is addressed to the sound discretion of the trial judge. Here the trial judge found Appellee not guilty of laches (R. 94). This

decision will not be disturbed on appeal, there clearly being no basis for charging the trial court with an abuse of discretion.

The Kermit, 76 F. 2d 363 (9CCA).

“As the decisions indicate, the question of laches is addressed to the sound discretion of the trial judge, and his decision will not be disturbed on appeal unless it is so clearly wrong as to amount to an abuse of discretion. In this case we cannot say that the lower court abused its discretion.”

The following authorities support the finding of the trial court under circumstances similar, with variations, to those in this case.

Hughes v. Silva, 184 P. 415, 42 Cal. App. 785;

Davies v. Metropolitan Life Ins. Co., 63 P. 2d 529, 189 Wash. 138;

Hansen v. Bear Film Co., 168 P. 2d 946, 28 C 2d 191;

Wight v. Rohlfss, 72 P. 2d 142, 9 C 2d 620;

Boardman v. Watrous, 35 P. 2d 1106, 178 W. 690;

Enyart v. Merrick, 34 P. 2d 629, 148 Ore. 321.

The statement in Appellant's brief (pp. 57-58) that “Alfred R. Sadler, one of the alleged beneficiaries, certainly had notice that Edgar A. Sadler disclaimed and denied any trust so far as plaintiff was concerned,” is without support in the record, and is contrary to the finding of the trial Court. The case of *Williams v. Woodruff*, 85 P. 90, 35 Colo. 28, involving lack of diligence to ascertain the right to

enforce a constructive trust, does not help Appellant here where we have an express trust expressly recognized through the years. Fraud is not involved here, as was the case in *Fortner v. Cornell*, 163 P. 2d 299, 66 Ida. 512. In *Robertson v. Burrell*, 42 P. 1086, 110 Cal. 568, no claim had been asserted for thirty-one years, and there had been no recognition during that time of the rights of the beneficiaries.

The distinguishing features of the situation involved in *Cooney v. Pedroli*, 49 Nev. 55, 235 P. 637, are indicated by the following excerpts from the opinion:

(1) "Every case must depend on its own circumstances."

(2) "The complaint shows a great lapse of time, 22 years, from the creation of the alleged trust. During all of this time Charles Pedroli was in possession of the property openly and notoriously exercising dominion over it as though it were his sole and separate property."

(3) "Beyond the bare statement in the complaint that Charles Pedroli was the trustee of his brother and sister, and that he at all times admitted and recognized their right, there is nothing in the complaint to support the claimed trust relation. * * * No act of recognition is alleged."

(4) "No reason is alleged in the complaint for respondent's long delay in making any claim to the property or asserting any interest as to Charles Pedroli's management of their share of it or desire to enjoy any of the profits from it * * *"

(5) "It seems incredible, however, that in all of these years and when the property was being managed profitably by Charles Pedroli that respondents should have no desire to share in any portion of the profits."

(6) "These facts, together with the prolonged silence of the respondents during the lifetime of Charles Pedroli concerning their alleged interest in the property, present a case of grave doubt as to the existence of the trust claimed."

(7) "Even if the trust relation were admitted, the futility of entering on an investigation after such a lapse of time when the trustee is dead, to determine equitably what portion belonged to his estate and what portion belonged to respondents, is apparent."

Similarly, the differences in the case of *Kleinclaus v. Dutard*, 81 P. 516, 147 Cal. 245, are apparent from the following excerpts from the opinion:

(1) "As has often been said, there is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine (laches). Each case, as it arises, must necessarily be determined by its own circumstances."

(2) "We must take the whole complaint together, and, so taken, it presents a case where every act of the alleged trustee was openly and notoriously hostile to the claim of plaintiffs."

(3) "He (the trustee) never by any act recognized any other person as having an interest therein."

(4) "They show a case where there was in fact no such acknowledgment of an existing trust as would excuse the enforcement of the claim for 35 years, and until after the death of the alleged trustee."

(5) "they show also a case of acquiescence by the alleged beneficiaries under such circumstances as to practically compel the conclusions that their claim is without foundation in fact."

(6) "The circumstances of this case are such that a court could not hope to do justice between these parties, were the trust relation clearly shown; and this constitutes another ground for the application of the doctrine of laches, for the difficulty is due entirely to the inexcusable delay."

In *Coyle v. Lamb*, 55 P. 901, 123 Cal. 264 relied upon by Appellant, the court, without discussing principles, held an action to collect delinquent rental barred by laches because the lease had expired 9 years before suit was brought, the lessee had died, and the property had been conveyed to another 8 years prior to suit. None of these facts is present in this case.

For the reasons stated, supported by the authorities we have cited, Appellee sees no merit in Appellant's contention that the findings of the trial court that there was no repudiation of the trust until after May 5, 1944 and that Appellee was guilty of no laches or unreasonable delay in commencing or maintaining this action should be reversed on review.

THE EVIDENCE IS CLEAR THAT AFTER THE DEATH OF REINHOLD SADLER IN 1906, HIS HEIRS CLAIMED THROUGH HIM AN INTEREST IN THE DIAMOND VALLEY RANCH, AND OTHER PROPERTIES IN ELKO AND WHITE PINE COUNTIES.

Appellant (Appellant's brief pp. 66-69) contends that the trial court erred in finding that Reinhold Sadler was the owner of any interest in the Diamond Valley Ranch. As a matter of fact, the court did not so find. (R. 88, finding No. 2). The court did find that Reinhold Sadler at the time of his death was the owner of and in possession of certain shares of stock in the Huntington Valley Stock & Land Company, a corporation.

The evidence is that Reinhold Sadler at one time owned the Diamond Valley Ranch (R. 602) and deeded it to the Diamond Valley Livestock and Land Company; that his administratrix inventoried 4000 shares of the Huntington & Diamond Valley Livestock and Land Co. as part of his estate (R. 206); that he had pledged 1999 shares of the stock of the Huntington and Diamond Valley Land and Stock Co. to Minnie C. Sadler (R. 214); that after Reinhold Sadler's death his heirs among them Edgar Sadler, claimed some interest in the Diamond Valley Ranch and other properties held by the Huntington and Diamond Valley Stock and Land Company, (R. 143, 144, 146); that in December, 1915 the Huntington and Diamond Valley Stock and Land Company brought a quiet title suit regarding the property against the Huntington Valley Stock and Land Company, the Diamond Valley Livestock and Land Company, the

heirs of Reinhold Sadler, and others (R. 12), which was jointly defended by the heirs of Reinhold Sadler, and in which a decree was entered by consent on March 2, 1918 (R. 23).

We are not here interested in again quieting the title to the Diamond Valley Ranch, this suit being brought to assert equities arising under and concurrently with the decree in that suit. Appellant does not point out how the question of ownership of the property prior to March 2, 1918 is material to his defense. The evidence Appellee has summarized is material, so far as we are concerned, to show the background for, and circumstances surrounding the execution of, the trust agreement on March 2, 1918.

**THE TRUST AGREEMENT DATED MARCH 2, 1918 (EXHIBIT 8)
IS SIGNED BY THE PARTIES DECLARING THE TRUST, AND
IS A SUFFICIENT MEMORANDUM.**

Finally, Appellant argues that the trust agreement, (Exhibit 8, R. 41) is insufficient because it is signed by only two of the five parties in interest.

We take issue with Appellant's statement that the agreement shows on its face that it was intended to be signed by all. We find no such expression of intention. Further, the letter from Louisa Sadler to Alfred Sadler dated February 29, 1918 (R. 282), prompting the execution of the written memorandum, Exhibit 8, states: "Bertha and Myself wanted you and Edgar to write a agreement". The old mother knew, if counsel for Appellant doesn't, that she,

Bertha and Clarence Sadler had performed their obligations under the settlement, and the only remaining unexecuted portions of the settlement agreement were obligations of Alfred and Edgar Sadler, as trustees.

The Nevada Statute of Frauds, N.C.L. 1527, requires only that the trust agreement be signed by the parties sought to be charged. Exhibit 8 should be construed in the light of the existing circumstances and the other documents executed contemporaneously with it. Louisa, Bertha and Clarence Sadler had done everything they were required to do in perfecting the settlement of the quiet title action. The only executory promises remaining were charged against Edgar and Alfred Sadler. This unilateral undertaking was fully memorialized in writing by exhibit 8 subscribed by the only parties upon whom were imposed unfulfilled promises.

Appellant's authorities involving contracts bilateral in character, imposing obligations on parties who had not executed the contracts, are not pertinent here.

And again, if we bow to Appellant's insistence that something must have been signed by all the Sadler heirs, why ignore the Stipulation (Exhibit 16, R. 18)?

CONCLUSION.

Appellee respectfully submits that the findings and decree of the trial court are fully supported by the evidence, that indispensable parties are not absent,

and that justice requires an affirmance of the decision appealed from.

Dated, Reno, Nevada,
January 8, 1948.

SPRINGMEYER & THOMPSON,
BRUCE R. THOMPSON,
Attorneys for Appellee.

No. 11,715

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR A. SADLER,

VS.

CLARENCE T. SADLER,

Appellant,

Appellee.

APPELLANT'S REPLY BRIEF.

H. R. COOKE,

JOHN D. FURRH, JR.,

First National Bank Building, Reno, Nevada,

Attorneys for Appellant.

FILED

MAY 1948

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
Re appellee's statement of the case	1
Appellee's action constitutes an attempt to impeach and nullify the decree of March 2, 1918.....	8
Appellee's action was barred by limitations as well as by the equitable doctrine of laches	10

Table of Authorities Cited

Cases	Pages
Bigley v. Watson (Tenn.), 39 S. W. 526, 38 L.R.A. 679....	10
Bois v. Bois (Ill.), 159 N. E. 217	6
Boman v. Boman (C.C.A. 9th), 49 F. 329.....	5, 6
Bullard v. Comrs. (C.C.A. 7th), 90 F. (2d) 144.....	9
Bush v. Lindsey, 44 Cal. 121	5
Cobb v. Killingsworth (Okla.), 187 P. 477	10
Crocker v. Mullegan, 139 N.Y.S. 381	5
Curry v. Curry (U.S.C.A.D.C.), 79 F. (2d) 172.....	9
Gage v. Gage, 29 N. H. 533	6
In re Craig's Est. (Cal.), 148 P. (2d) 100	6
In re Est. Ross (Cal.), 83 P. 976	5
In re Hassell's Est. (Cal.), 142 P. 838	5
In re Parrott's Est., 45 Nev. 318, 203 P. 258	4
In re Prickett's Est. (Cal.), 239 P. 406	5
In re Round's Est. (Cal.), 181 P. 638	5
In re Salmon (Cal.), 40 P. 1030, 40 A.S.R. 164	5
In re Stevens' Est. (Cal.), 23 P. 623	4
Nashville etc. R. R. Co. v. U. S., 113 U. S. 261, 28 L. ed. 971	8
Pick Mfg. Co. v. Gen. Motors Corp. (C.C.A. 7th), 80 F. (2d) 639	9
Re Garraud's Est., 35 Cal. 336	4
Rogers v. Springfield F. & M. Co. (Cal.), 268 P. 679.....	9
Rudolph v. Rudolph (Ill.), 69 N. E. 834, 99 A.S.R. 211....	6
Schneller v. Schneller (Ill.), 190 N. E. 121, 92 A.L.R. 838..	7
Spaniard v. Tantom (Okla.), 267 P. 623	5
State of Washington v. United States (C.C.A. 9th), 87 F. (2d) 421	2
Strong v. Smith (Mich.), 48 N. W. 183	6
Todd's Est. (Cal.), 109 P. (2d) 913	6
Utah Power & L. Co. v. U. S. (Crt. Claims), 42 F. (2d) 304	10

TABLE OF AUTHORITIES CITED

iii

	Page
Warner v. Tennessee etc. Corp. (C.C.A. 6th), 57 F. (2d) 642	9
Woods etc. Co. v. Yankton County (C.C.A. 8th), 54 F. (2d) 304	9
Yeates v. Yeates (Ark.), 16 S. W. (2d) 996, 65 A.L.R. 466	5

Statutes

N.C.L., Secs. 8524 and 8527	10
N.C.L., Sec. 9919	3
N.C.L., Sec. 9922	2
N.C.L., Sec. 10340	11

Texts

16 Am. Jur., 853, Secs. 82, 83	5
18 C. J., 841, Sec. 71 and N. 24	5
34 C. J. 133, Sec. 337	9
54 C. J. 104	6
60 C. J. 1188	6
30 C. J. S. 1129, Sec. 680	9
15 R.C.L. 869, Sec. 345	9
28 R.C.L. 82, Sec. 30 and N. 20	5

No. 11,715

IN THE

United States Circuit Court of Appeals
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EDGAR A. SADLER,

Appellant,

VS.

CLARENCE T. SADLER,

Appellee.

APPELLANT'S REPLY BRIEF.

RE APPELLEE'S STATEMENT OF THE CASE.

Appellee states (Ans. Br. p. 3; see also Id. pp. 6, 22) that the ownership of the Diamond Valley Ranch was a "matter of dispute" between the heirs of Reinhold Sadler and the Hermann J. Sadler branch of the family acting through the Huntington and Diamond Valley Stock and Land Company. We say there was no dispute as to any of the parties claiming as heirs of Reinhold Sadler, deceased; that the counterclaims of Edgar, Alfred, Clarence, Bertha and Louisa Sadler in the 1918 suit had to do with a claim of adverse possession and claims for money judgments for advances and for services only (R. 543, 555) in connection with said Diamond Valley Ranch. No claim whatsoever as heirs of Reinhold Sadler were

ever asserted in said action against the land or property involved here. The reference to “(Para. 5 of Ex. 1)” in appellee’s answer brief, p. 4, is in error, as there is no Paragraph 5 of such exhibit in the record.

In our opening brief (pp. 6-10) we made the point that Edgar Plummer, grandson of Reinhold Sadler, was an indispensable party having an undivided 25% interest, but the trial Court ruled without his being before the Court that his interest was only 13%.

The Statute, N.C.L., Sec. 9922 (Op. Br. p. 9) mandatorily provides for the precise situation of this grandson, i.e., that he takes the same interest his deceased mother would have taken had she survived the testator Reinhold Sadler. The trial Court found plaintiff-appellee was the owner of an undivided 29%. Admittedly the other heirs, viz.: Edgar and the heirs of Alfred, would each be entitled to exactly the same interest as appellee. Hence the decree awards a total of 87% of the entire estate, leaving only 13% to Edgar Plummer.

This Court has ruled that the test in determining what is an indispensable party is, *inter alia*:

“Will the decree if made, in the absence of such party, have no injurious effect on the interests of such absent party?”

State of Washington v. United States (C.C.A. 9th), 87 F. (2d) 421, 428.

See also: Opening Brief, p. 10.

Edgar Plummer, as grandson of testator, was the issue of testator's daughter Wilhelmina, who died in 1903, predeceasing testator who died in 1906. Testator omitted to provide in his will for said grandson. The Nevada statute provides:

“When any testator shall omit to provide in his or her will for any of his or her children, or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate”.

N.C.L., Sec. 9919.

The only Nevada decision construing the above statute is the case *infra*, where a daughter by adoption claimed the benefit of the statute in the estate of her deceased father who left a will omitting to make provision for said daughter. The trial Court decided against the claim of the daughter, but this was reversed on appeal,—the Court in its opinion saying:

“The statute which she has invoked by showing that she is the natural and adopted child of the deceased raises the presumption that her omission from the will was unintentional. Before this presumption can be overthrown and the contrary intention established in point of law, it must appear from the face of the will that the intention to omit appellant is expressed therein or implied in language so strong as to render any other conclusion unreasonable. If the import of the language of the will is not plain enough to warrant such conclusion, the presumption raised by the

law must prevail on this appeal, and the judgment of dismissal be reversed."

In re Parrott's Estate, 45 Nev. 318, 203 P. 258-261.

Mere devise of whole estate by testator to his wife, without mentioning his children, held not an intentional omission of children.

Re Garraud's Est., 35 Cal. 336, 337.

Language in will relied upon to show intentional exclusion of child or grandchild, must show such intent directly or by implication equally as strong.

In re Stevens' Est. (Cal.), 23 P. 623, 625.

The Circuit Court, by Judge Hawley, held that the reference in the case *infra* to "my heirs at law" in the will showed an intentional exclusion of the children. The case was appealed, this Court in its opinion saying, *inter alia*:

"The fact that the children are not named or alluded to in such a manner as to affirmatively show that they were in the testator's mind will furnish conclusive evidence that they were forgotten, and that the testator unintentionally left them unprovided for. * * * The statute creates a presumption that the children were forgotten unless they are named or provided for in the will. * * * The terms of the will, in order to show the intent of the testator to remember his children, or to make provision for them, should, under the statute, be clear, specific, definite and certain. The presumptions of the law are all in favor of the children. These presumptions, in order to disinherit them, or to cut them off with

a shilling or other nominal sum, can only be overcome by the use of words plainly indicating that the testator had his children in his mind at the time he made his will. This must appear either by express mention, or by necessary implication on the face of the will itself."

The judgment of the Circuit Court was reversed.

Roman v. Roman (C.C.A. 9th), 49 F. 329, 330, 332.

See also:

In re Prickett's Est. (Cal.), 239 P. 406, 408-409;

In re Salmon (Cal.), 40 P. 1030, 40 A.S.R. 164;

In re Est. Ross (Cal.), 83 P. 976;

In re Hassell's Est. (Cal.), 142 P. 838;

Spaniard v. Tantom (Okla.), 267 P. 623, 625;

Yeates v. Yeates (Ark.), 16 S.W. (2d) 996, 65 A.L.R. 466;

28 *R.C.L.* 82, Sec. 30 and N. 20;

16 *Am. Jur.*, 853, Sec. 82, 83;

Crocker v. Mullegan, 139 N.Y.S. 381;

Bush v. Lindsey, 44 Cal. 121, 126;

In re Round's Est. (Cal.), 181 P. 638, 639.

Where testator fails to provide for child or issue, of child, there is a presumption said child was unintentionally overlooked. 18 *C.J.*, 841, Sec. 71 and N. 24.

The will here was made September 28, 1881. Testator's daughter (and mother of Edgar Plummer) Wilhelmina died September 9, 1903 (R. 3), and

testator died January 29, 1906. Edgar Plummer was born sometime intermediate the making of the will in 1881 and September 9, 1903 when his mother died. Testator could not have had this grandson in mind when the will was made because the grandson was not then born. The clause (R. 9) in the will that "in case of death of either of the children, then I leave the portion to which it would be entitled to remaining ones and my wife share and share alike" cannot be accepted as evidence of an intentional exclusion of issue of such children. The term "remaining ones" we believe to be synonymous with survivors (60 C. J., 1188; also 54 C. J., 104), and devises to a child "or to the survivor" has been uniformly held not to show intentional exclusion of a grandchild. See

Todd's Est. (Cal.), 109 P. (2d) 913, 918.

To same effect:

Strong v. Smith (Mich.), 48 N.W. 183.

Presumption that testator intended property to go according to laws of descent will be applied in construing ambiguous wills.

Bois v. Bois (Ill.), 159 N.E. 217.

See also:

In re Craig's Est. (Cal.), 148 P. (2d) 100, 104;

Gage v. Gage, 29 N.H. 533 (cited in *Boman v.*

Boman (C.C.A. 9th), 49 F. 329, 332).

Burden is upon party claiming statute does not apply.

Rudolph v. Rudolph (Ill.), 69 N.E. 834, 99 A.S.R. 211, 215.

The Illinois statute was very similar to the Nevada statute on the point as to what exclusionary language is necessary to show an intentional omission by testator of the child or the issue of the child. The case *infra* is a leading case and is in point to the effect that a testator by making a devise to his children and in case of the death of any of them, to the survivors, did not thereby exclude a grandchild from taking the benefit of the statute, i.e., the same share as such grandchild would have taken if the testator had died intestate. We excerpt:

“There is nothing in the circumstances shown by the will to indicate that at the time it was executed the testator intended that the statute should not apply. There is nothing beyond the bare use of the technical words of survivorship to indicate that he had in mind the disinheritance of one of his grandchildren who had lost his parent before the death of the testator. It cannot be said that he intended to cut off Christian’s children because Christian had no children when the will was made. Such an intention could be discovered only from a finding that he intended to cut off any grandchildren whose parent or parents predeceased him. Such would be a most unnatural intention.”

Schneller v. Schneller (Ill.), 190 N.E. 121, 92 A.L.R. 838-842.

**APPELLEE'S ACTION CONSTITUTES AN ATTEMPT TO IMPEACH
AND NULLIFY THE DECREE OF MARCH 2, 1918.**

In our opening brief (pp. 36-43), we discussed point and cited authorities. Appellee claims (Ans. Br. p. 29) that the March 2, 1918 decree was entered by consent and therefore is not a bar to this suit (in which he is asserting claims and interests which said decree adjudged did not exist). In the record and we believe also in his brief, reference is repeatedly made to the March 2, 1918 decree being for a "family settlement" and by consent, etc., as though that justified appellee's attack.

"A decree in equity, by consent of parties and upon a compromise between them, is a bar to a subsequent suit upon a claim therein set forth as among the matters compromised and settled". (Syll.)

Nashville etc. R. R. Co. v. U. S., 113 U.S. 261,
28 L. ed. 971.

In the case *supra* the Court in its opinion (28 L. ed. at page 973) said:

"* * * a decree, which appears by the record to have been rendered by consent, is always affirmed without considering the merits of the cause. A fortiori, neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree".

"But it is said that the decree was merely a consent decree based upon a family settlement. * * * The same general rules which govern judgments generally apply to a judgment by consent as upon stipulation. It is an estoppel, merger or bar

under the same circumstances and to the same extent as any other judgment * * *"

Bullard v. Comrs. (C.C.A. 7th), 90 F. (2d) 144, 147.

See also:

Rogers v. Springfield F. & M. Co. (Cal.), 268 P. 679, 681.

"For a consent decree, within the purview of the pleadings and the scope of the issues, is valid and binding upon all parties consenting, open neither to direct nor collateral attack. 'A fortiori, neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree'."

Curry v. Curry (U.S.C.A. D.C.), 79 F. (2d) 172, 174.

See also:

30 *C.J.S.* 1129, Sec. 680.

"A consent decree, which is accepted by the parties themselves as a determination of the controversy and sanctioned by the court, has at least the same force and effect as judgments rendered judicially upon contest or trial." (Citing cases.)

Pick Mfg. Co. v. Gen. Motors Corp. (C.C.A. 7th), 80 F. (2d) 639, 641.

See also:

34 *C. J.* 133, Sec. 337;

15 *R. C. L.* 869, Sec. 345;

Warner v. Tennessee etc. Corp. (C.C.A. 6th), 57 F. (2d) 642, 643;

Woods etc. Co. v. Yankton County (C.C.A. 8th), 54 F. (2d) 304, 308;

Utah Power & L. Co. v. U. S. (Crt. Claims),
42 F. (2d) 304, 308;

Cobb v. Killingsworth (Okla.), 187 P. 477, 479.

Consent judgment entered on settlement of account of administrator, is not open to attack on settlement of trust estate created thereunder.

Bigley v. Watson (Tenn.), 39 S.W. 526, 38
L.R.A. 679, 680.

**APPELLEE'S ACTION WAS BARRED BY LIMITATIONS AS
WELL AS BY THE EQUITABLE DOCTRINE OF LACHES.**

In our opening brief, pages 56 et seq. we argued for application of bar because of plaintiff's laches. At page 5, Op. Br. (also see R. 109), we referred to appellant's defense of the Nevada statute of limitations, N.C.L., Secs. 8524 and 8527,—the first named statute fixing period at three years, and the second named statute fixing a four-year period "after the cause of action shall have accrued".

In the instant case we say appellee's cause of action, if any he had, accrued in September, 1937, when he was informed by his attorney-in-fact (Ex. K—R. 565) that appellant had sold some 800 head of the alleged "trust" cattle and received \$60.00 per head,—making a round total of \$48,000.00, and which, if we are to believe appellee, appellant converted and retained to his own personal use, as the record is bare of the slightest evidence that he ever accounted for or paid any part of that money to the alleged beneficiaries or any of them. This is confirmed by Ex. N

(R. 573), a letter written by appellee to Alfred, his attorney-in-fact, wherein he charges appellant was using "trust" funds in the purchase of cattle "exclusively for his benefit". If true, under Nevada statute, N.C.L., Sec. 10340, appellant would have been guilty of felony embezzlement punishable by imprisonment in the state penitentiary. Hence it is not too much to charge that with knowledge of such action, keeping appellee's claims in mind, that appellee's alleged cause of action immediately accrued. But he deferred action for some twelve years or eight years beyond the statute of limitations period.

For the reasons above stated and as set forth more fully in appellant's opening brief, we feel the judgment of the trial Court is wrong and should be reversed.

Dated, Reno, Nevada,
January 20, 1948.

Respectfully submitted,
H. R. COOKE,
JOHN D. FURRH, JR.,
Attorneys for Appellant.

No. 11,715

IN THE

**United States Circuit Court
of Appeals**

FOR THE
Ninth Circuit

EDGAR A. SADLER,

Appellant,

vs.

CLARENCE T. SADLER,

Appellee.

**PETITION BY APPELLANT
FOR RE-HEARING**

H. R. COOKE

JOHN D. FURRH, JR.

Attorneys for Petitioner-Appellant.

IN THE
United States Circuit Court
of Appeals
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EDGAR A. SADLER,

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vs.

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Appellee.

No. 11,715

PETITION BY APPELLANT
FOR RE-HEARING

TO THE HONORABLE THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT:

NOW COMES the above-named Appellant, EDGAR
A. SADLER, and respectfully petitions the above-entitled

Court for a re-hearing hereof, upon the following grounds and for the following reasons:

I.

In the decision and opinion of the Court, the Court established as the law of this Circuit that a finding may be made by trial court that a property interest of an absent party belongs to plaintiff in such action.

II.

In its decision and opinion, as it appears to Appellant, the Court ruled that a person owning a non-severable interest in property, was not an indispensable party to an action for the establishment of a trust and an accounting in respect of such property.

III.

By the said opinion and decision, as appears to Appellant, the Court holds that despite a lack of jurisdiction of the District Court for want of indispensable parties, said Court may nevertheless proceed with the parties before it, and adjudicate their rights, and the defect of absence of an indispensable party could be cured by said Court reserving the question of the rights of such absent indispensable party for later determination, at which the absent indispensable party might appear and be heard. Appellant's claim is that jurisdiction, *i. e.*, presence of indispensable parties, must exist

in lower court before any valid judgment therein can be entered.

IV.

Appellant contends that the said opinion and decision are in conflict with a case previously decided by the Supreme Court of Nevada (*Cooney v. Pedrolis*, 49 Nev., 55; 215 P., 637), and that the law of the State was thereby established to be that when so long a time (22 years) had elapsed and defendant was in open possession, exercising dominion over the alleged trust property as his own, laches precludes alleged beneficiaries, irrespective of any repudiation of the claimed trust, because of the inability of a court of equity under the circumstances to do justice to the parties.

WHEREFORE, Appellant respectfully petitions the Court for a re-hearing herein.

Dated: April 13, 1948.

H. R. COOKE
JOHN D. FURRH, JR.
First National Bank Building
Reno, Nevada

Attorneys for Petitioner-Appellant.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition, in our opinion, is well founded and is not interposed for delay.

Dated: Reno, Nevada, April 13, 1948.

H. R. COOKE
JOHN D. FURRH, JR.
First National Bank Building
Reno, Nevada

Attorneys for Petitioner-Appellant.

